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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HENDRICKSON BROTHERS, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 1, 1988

QUESTION PRESENTED FOR REVIEW

Whether, in an antitrust conspiracy case, where a defendant engaged in no affirmative act of concealment of the conspiracy and acts of concealment by a co-defendant were not agreed to or known by the defendant, may a plaintiff sustain its burden of proving that defendant's fraudulent concealment tolled the statute of limitations either because a conspiracy is inherently self-concealing or the acts of a co-defendant without the knowledge of the defendant are attributable to the defendant?

The question whether an antitrust conspiracy may be found to be inherently self-concealing has been considered by seven Circuit Courts of Appeals. The First, Fourth, Sixth, Seventh, Eighth and Tenth Circuits have answered the question in the negative, holding that the doctrine of fraudulent concealment requires a defendant's affirmative act of concealment. The Second Circuit alone has answered the question in the affirmative, ruling that proof of the conspiracy is sufficient to prove fraudulent concealment by the defendant.

The complementary question whether the acts of a co-defendant to conceal a conspiracy, which are not known or agreed to by a defendant, may be imputed to the defendant to satisfy plaintiff's burden of showing fraudulent concealment has been considered by two Circuit Courts. The Tenth Circuit, sitting in banc, implicitly answered the question in the negative and reinstated a ruling of the District Court of Colorado holding that the acts of concealment of a conspiracy by one defendant should not be imputed to a co-defendant. The Second Circuit in this case has answered the question in the affirmative, ruling the affirmative acts of concealment of a conspiracy committed by a co-defendant, not known to another defendant, are properly admissible against the defendant to establish the defendant's fraudulent concealment of a conspiracy.

The Attorney General of Colorado has petitioned this Court in *State of Colorado* v. *Western Paving Construction Co.*, Docket Number ____, for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit on the issue of the appropriate standard for applying the fraudulent concealment doctrine in federal antitrust conspiracy actions.

PARTIES TO THE PROCEEDING

Petitioner is Hendrickson Brothers, Inc.[1]

Respondent is the State of New York.

[1] Amfar Asphalt Corp., Francis Ambrosio, Anthony Farino, Jack Farino and Lizza Industries, Inc. were co-appellants in the appeal before the United States Court of Appeals for the Second Circuit. Petitioner has no knowledge whether the co-appellants are filing petitions to this Court for a writ of certiorari. Pratt and Pratt Inc., James J. Pratt and Herbert Hochreiter were defendants in the proceedings in the United States District Court for the Eastern District of New York but were not parties to the appeal in the Circuit Court.

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VS.

STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests that a writ of certiorari be issued to review that part of the decision of the United States Court of Appeals for the Second Circuit, dated February 16, 1988, which affirmed a final judgment of the United States District Court for the Eastern District of New York which held all defendants jointly and severally liable in the sum of $7,455,000 in treble damages on the first count of a complaint which alleged a conspiracy to obtain highway construction contracts from the plaintiff State of New York (the "State") at non-competitive levels in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, dated February 16, 1988, reported at 840 F.2d 1065, appears in the Appendix hereto at pages App. 1-38. The Court of Appeals' decision denying a petition for rehearing, with suggestion for rehearing in banc, is contained at page App. 39 of the Appendix, the judgment of the District Court is set forth at pages App. 40-41, the order of the District Court denying defendants' motion for judgment notwithstanding the verdict and for a new trial is set forth at page App. 42 of the Appendix, and the opinion of the District Court denying the State's motion for partial summary judgment is included at pages App. 43-45 of the Appendix.

JURISDICTION

The decision of the Court of Appeals was made on February 16, 1988. A timely petition for rehearing with suggestion for rehearing in banc was denied on April 7, 1988. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The complaint alleges that Hendrickson violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The $7,455,000 judgment against Hendrickson includes trebling pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 15. Hendrickson's statute of limitations argument is based, in part, on the four-year statute of limitations provisions of Section 15b of the Clayton Act, 15 U.S.C. § 15b. The statutory provisions are set forth at page App. 64 of the Appendix.

STATEMENT OF THE CASE

This action was commenced on June 16, 1983. (840 F.2d at 1068; App. 4). On that date, plaintiff filed a civil complaint on behalf of itself and the County of Suffolk, charging nine defendants with violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and violation of New York's counterpart antitrust

law, New York General Business Law § 340 et seq. The first claim[2] alleges that all nine defendants — Lizza Industries ("Lizza"), its president Herbert Hochreiter, Amfar Asphalt Corp. ("Amfar"), Hendrickson, Pratt & Pratt, Inc. ("Pratt"), Francis Ambrosio, Anthony Farino, Jack Farino, and James J. Pratt — entered into an "overall conspiracy" to "submit collusive, non-competitive and rigged bids" to the New York State Department of Transportation ("NYSDOT") in connection with the letting of highway construction contracts, as a result of which the prices of such contracts were established and maintained at a non-competitive level. (840 F.2d at 1069; App. 4).

Plaintiff alleged that this overall bid-rigging scheme embraced five NYSDOT contracts: the Veterans Memorial Highway contract let to Lizza in February 1977, the Port Jefferson contract let to Amfar in June 1977, the Shelter Island contract let to Lizza in October 1977 and the Wantagh Avenue contract let to Pratt in October 1978. (840 F.2d at 1069; App. 5). The Long Island Expressway contract was let to Hendrickson by NYSDOT on April 13, 1978. (840 F.2d at 1069; App. 5).

Plaintiff's witness FBI Agent Melore testified at trial that two FBI agents spent two to three months at Hendrickson's offices in 1978 investigating Hendrickson's business records. (A944-45; App. 58-60). The evidence at trial established, and the Circuit Court ruled, that Hendrickson did not participate in any acts of concealment of the antitrust conspiracy alleged in the complaint. (840 F.2d at 1084; App. 34). Although the FBI investigation concluded in 1978, unlike all of the other defendants in the civil action, Hendrickson alone was not indicted or made a party to any federal or state criminal or civil action involving any allegation of wrongdoing relating to the Long Island Expressway contract or any other NYSDOT contract until the commencement of the State's civil action in June, 1983.[3]

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[2] Hendrickson was not a defendant on a separate, second claim of the complaint alleging price fixing on supply contracts entered into by the County of Suffolk.

[3] Lizza and Hochreiter were convicted in the United States District Court for the Eastern District of New York and their convictions were affirmed in *United*

footnote continued

The District Court Proceedings

In denying plaintiff's motion for partial summary judgment on the issue of liability on its claim against Lizza, Hochreiter, Pratt Inc. and Pratt, the District Court held plaintiff was required to prove that "affirmative acts of fraudulent concealment by the defendant independent of the underlying conspiracy ..." (App. 52). The District Court concluded that "we have found no decisions in the Second Circuit directly holding that an antitrust conspiracy is inherently self-concealing." (App. 52).

No evidence was introduced at trial linking Hendrickson to defendant Amfar's affirmative acts of concealment. The trial court concluded that "there's no evidence that anybody but Amfar participated in the affirmative acts." (A1283) (App. 63) (References "A" are to the Appendix on Appeal to the Second Circuit). The trial court charged the jury over defendants' objection, that "[i]t does not matter whether only one defendant committed the [affirmative] acts, all the defendants are bound by the acts of a conspirator designed to conceal the existence of the conspiracy." (A1269; App. 61)

After the jury returned a special verdict finding all defendants liable on the claims in which they were named, all defendants moved for judgment notwithstanding the verdict or for new trials. Defendants argued that plaintiff had failed to adduce by legally sufficient, admissible evidence the existence of the overall conspiracy charged in the first claim, and that plaintiff had failed to prove affirmative acts of fraudulent concealment by each defendant independent of the underlying conspiracy. District Judge Jacob Mishler denied the motions without opinion on December 9, 1986. (App. 42).

The Court of Appeals Proceedings

On appeal, the United States Circuit Court for the Second Circuit affirmed the judgment of the District Court. The Circuit

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States v. Lizza Industries Inc., 775 F.2d 492 (2d Cir. 1985) *cert. denied*, 475 U.S. 1082 (1986). Pratt and Pratt Inc. pleaded guilty, as described in the Circuit Court's opinion. (840 F.2d 1069; App. 4-5).

Court stated that plaintiff's claims were time-barred[4] and that only by proving defendants' fraudulent concealment could plaintiff "escape the statutory time bar." The Court ruled (840 F.2d at 1083; App. 30-31):

> The present lawsuit was commenced on June 16, 1983; the State's causes of action accrued prior to June 16, 1979, since the latest of the contracts at issue in the present case was awarded prior to the date. In order to escape the statutory time bar, the State sought to show the defendants had fraudulently concealed the State's claims from it, thereby tolling the statute of limitations until the State's discovery of the claims.

The Circuit Court discussed the Court's decision in *Bailey* v. *Glover*, 88 U.S. (21 Wall) 342, 349 (1875) and then recited the three-part test for establishing defendants' fraudulent concealment (840 F.2d at 1083; App. 31):

> (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part.

Only the first of the three requirements is at issue here. The Circuit Court held that plaintiff had satisfied its burden of showing defendants' fraudulent concealment and rejected the District Court's ruling that plaintiff had to "establish affirmative acts of fraudulent concealment independent of the underlying conspiracy." (App. 52). The Circuit Court inaccurately described the jury's verdict on the critical question of defendants' fraudulent concealment. The Circuit Court stated, "The jury found that

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[4] Section 4B of the Clayton Act provides that "[a]ny action to enforce any cause of action under [the antitrust laws] shall be forever barred unless commenced within four years after the cause of action occurred." 15 U.S.C. § 15b. (App. 64).

neither the State nor the County was aware of the conspiracies prior to June 16, 1980; that the co-conspirators took affirmative steps to conceal the existence of the two conspiracies ... (840 F.2d at 1072; App. 10). The jury was not requested nor required to find and did not find that *all* of the "co-conspirators took affirmative steps to conceal the existence of the two conspirators ..." Instead, the question posed to the jury in the special verdict form and answered in the affirmative was "Did *any* of the co-conspirators take any affirmative conduct, during the existence of the conspiracy; yes or no?" (emphasis added) (A49-50; App. 56-57).

In the first of two holdings on the fraudulent concealment issue, the Court ruled that since "defendants' scheme necessarily included concealment of the existence of their conspiracy, proof of the conspiracy itself sufficed to prove concealment by the co-conspirators." (840 F.2d at 1084; App. 33). The Circuit Court also held that "it was entirely appropriate for the [District] Court to allow use of the Amfar defendants' actions [of concealment] against the other co-conspirators – even if the later did not know of the actions – since they were in furtherance of the conspiracies." (840 F.2d at 1085; App. 34).

REASONS FOR GRANTING THE WRIT

This petition should be granted to allow the Court to promptly resolve the conflict among several Circuits regarding this critical question: whether an antitrust conspiracy is inherently "self-concealing" so that a plaintiff may sustain its burden of proving a defendant's fraudulent concealment, and thus deny defendant its statute of limitation defense, without proving a single, affirmative act of concealment by the defendant. This petition also should be granted to allow the Court to answer a related question: whether the acts of concealment of a co-defendant which are not known to a defendant should be imputed to the defendant for the purpose of establishing the defendant's fraudulent concealment of an antitrust conspiracy.

Although the complaint in this action alleged a conspiracy to violate the federal antitrust laws, the issues raised in this petition are material to all federal conspiracy actions. The continuing vitality of a statute of limitations in a conspiracy action

is threatened by a ruling that proof of a conspiracy, by itself, establishes each conspirator's fraudulent concealment of the conspiracy. The very existence of a limitations defense in a conspiracy action is even more dramatically threatened by a ruling that the intentional acts of concealment of a co-defendant – unbeknownst to other defendants – are nonetheless legally imputed to the other defendants to satisfy the requirement of proving the other defendants' fraudulent concealment of the conspiracy.

These twin holdings, which were adopted by the Second Circuit, effectively eviscerate the statute of limitations defense in antitrust – and all other – conspiracy actions. The Second Circuit's ruling that conspiracies are by their very nature self-concealing conflicts with the holdings of six other Circuit Courts. The Sixth Circuit in *Pinney Dock and Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988), the Tenth Circuit in *State of Colorado* v. *Western Paving Construction Co.*, 841 F.2d 1025 (10th Cir. 1988), the First Circuit in *Berkson* v. *Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985), the Fourth Circuit in *Pocahontas Supreme Coal Co.* v. *Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), the Eighth Circuit in *Kansas City, Mo.* v. *Federal Pacific Elect. Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962), and the Ninth Circuit in *Hennegan* v. *Pacifico Creative Service, Inc.*, 787 F.2d 1299 (9th Cir.) *cert. denied*, 107 S.Ct. 279 (1986) have all held that antitrust conspiracies are not found to be inherently self-concealing and that plaintiff must show affirmative acts of concealment to satisfy its burden on the fraudulent concealment exception to the statute of limitations.

Only the Second Circuit has held in *Hendrickson Brothers* that an antitrust conspiracy is inherently self-concealing.

There is also a conflict between two Circuits whether acts of concealment committed by a co-defendant – not known to a defendant – are nonetheless attributable to the defendant to establish the defendant's fraudulent concealment of a conspiracy. The Tenth Circuit, sitting *in banc*, in *State of Colorado* v. *Western Paving Construction Co.*, *supra*, by an evenly divided *in banc* court adopted the judgment of the District of Colorado, 630

F. Supp. 206 (D. Colo. 1986), which had ruled that plaintiff State of Colorado failed to establish that the act of concealment of one defendant should be imputed to a co-defendant to deny the co-defendant its statute of limitations defense.

The Second Circuit held in *Hendrickson Brothers* without citing a single decision involving a civil antitrust conspiracy, that acts of concealment of one defendant in a conspiracy action, even if not known and not agreed to by a co-defendant, are attributable to the co-defendant.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO REVIEW THE SECOND CIRCUIT'S DECISION WHICH IS CONTRARY TO OTHER FEDERAL COURTS OF APPEALS THAT HAVE ADDRESSED THE APPROPRIATE STANDARD FOR APPLYING THE FRAUDULENT CONCEALMENT EXCEPTION TO THE ANTITRUST STATUTE OF LIMITATIONS

A. *The Fraudulent Concealment Doctrine Requires Proof of Affirmative Acts of Concealment.*

The several Circuits that have addressed the issue of what standard should govern in applying the fraudulent concealment doctrine in antitrust cases have almost uniformly held that this equitable tolling doctrine requires proof of affirmative acts of concealment.

1. *The Sixth Circuit Decision in Pinney Dock.*

On February 3, 1988, almost two weeks before the Second Circuit's decision in *Hendrickson Brothers*, the Court of Appeals for the Sixth Circuit, in a unanimous opinion, held that the doctrine of fraudulent concealment in antitrust cases requires proof of affirmative acts of concealment and specifically rejected the proposition that wrongful concealment may be established by merely arguing that an antitrust conspiracy is self-concealing. *Pinney Dock and Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988).

The Sixth Circuit analyzed the Court's decision in *Bailey* v. *Glover*, 88 U.S. (21 Wall) 342 (1875), upon which the Second Circuit relied in the instant action, as well as the other Supreme Court opinions dealing with the doctrine of fraudulent concealment, and concluded that those cases hold that where "fraud" is the basis for liability, additional proof of concealment is unnecessary. 838 F.2d at 1467-1469. The Sixth Circuit recognized, however, that this is not the rule for causes of action outside the field of fraud. As stated by Professor Dawson in an article quoted by the Sixth Circuit:

> [F]or suspension of the statute [of limitations] outside the field of 'fraud' there should be added to the suitor's ignorance some affirmative misconduct by the opposite party, preventing discovery and excusing delay.

838 F.2d at 1468-69.

Since the lower court in *Pinney Dock* relied upon an earlier lower court opinion within the Sixth Circuit, *Gaetzi* v. *Carling Brewing Co.*, 205 F. Supp. 615 (E.D. Mich. 1962), in which there was a discussion of self-concealment in an antitrust context, the Sixth Circuit carefully reviewed that opinion and concluded that *Gaetzi* was not incompatible with the principle that affirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary duty. 838 F.2d 1469-1472. The Sixth Circuit, by way of conclusion, ruled:

> Mere silence, or one's unwillingness to divulge one's allegedly wrongful activities, is not sufficient. As the underlying cause of action here is based upon alleged antitrust violations not fraud, we agree with Judge McCree's rationale in *Gaetzi* that a plaintiff should be required to prove affirmative acts of concealment, particularly in light of the strong policy in favor of statutes of limitations.

838 F.2d at 1472.

2. *The Tenth Circuit's Decision in Western Paving.*

The panel decision of the Circuit Court in *State of Colorado* v. *Western Paving Construction Co.*, ("*Western Paving*"), 630 F. Supp. 206 (D. Colo. 1986), *reversed*, 833 F.2d 867 (10th Cir. 1987), *reversed in banc and adopting the judgment of the district court*, 841 F.2d 1025 (10th Cir. 1988) is the only Circuit Court decision cited by the Second Circuit in *State of New York* v. *Hendrickson Brothers*, in its discussion of "self-concealing" conspiracies. (840 F.2d at 1083; App. 32) However, the panel decision of the Tenth Circuit upon which the Second Circuit relied, was vacated and withdrawn by the full Court sitting *in banc* and the judgment of the District Court of Colorado was affirmed by an equally divided court.[5]

The District of Colorado in *Western Paving* had rejected the State of Colorado's argument that a conspiracy to violate the antitrust laws could be inherently self-concealing, ruling, "The concealment element requires proof that the defendant engaged in *affirmative* conduct designed to lead a reasonable person to believe that he did not have a claim for relief." 630 F. Supp. at 209; (emphasis in original). Succinctly stated, the court held that "Fraudulent concealment occurs when a defendant takes affirmative steps in addition to the original wrongdoing to prevent the plaintiff from discovering the wrong." 630 F. Supp. at 210.

The District Court also ruled that "the submission of an allegedly false noncollusion affidavit is, at most, a failure to disclose or denial of wrongdoing. Such denial does not amount to an affirmative act of concealment ... The courts, including the Tenth Circuit, have universally held that denial of wrongdoing does not constitute fraudulent concealment." 630 F. Supp. 209-10; (citations omitted).

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[5] The decision of the full bench of the Tenth Circuit is, in its entirety: "The prior judgment of this Court is vacated and the panel opinion of this court, 833 F.2d 867 (1987), is withdrawn. The judgment of the District Court is affirmed by an equally divided Court." 841 F.2d at 1025.

3. *Decisions In the Other Circuits.*

In addition to the Sixth Circuit's decision in *Pinney Dock* and the *in banc* ruling of the Tenth Circuit in *Western Paving*, both decided this year, four other Circuits have held that antitrust conspiracies are not inherently self-concealing. In affirming a summary judgment for the defendant in a conspiracy case brought under Section 1 and 2 of the Sherman Act, the *First Circuit* declared that:

> [i]t is well established that 'the plaintiff must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief. Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure.'

Berkson v. *Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985), *rehearing denied*, 471 U.S. 1095 (1985)(complaint dismissed as time-barred because plaintiff's complaint contained "no charge of affirmative conduct" by defendants to conceal antitrust claim).

In *Pocahontas Supreme Coal Co.* v. *Bethlehem Steel*, 828 F.2d 211, 218-19 (4th Cir. 1987), the *Fourth Circuit* affirmed the dismissal of a price-fixing conspiracy complaint as time-barred and found defendant's denials of plaintiff's inquiries regarding the illegal conspiracy inadequate for tolling, since "to permit a claim of fraudulent concealment to rest upon no more than an alleged failure to own up to illegal conduct upon this sort of timid conduct would effectively nullify the statute of limitations in these cases. It can hardly be imagined that illegal activities would ever be so gratuitously revealed. 'Fraudulent Concealment' implies conduct more affirmatively directed at deflecting litigation than that alleged here."

Additionally, in an antitrust conspiracy case, the *Fifth Circuit* declared that an antitrust plaintiff who seeks tolling of the

limitations period under the doctrine of fraudulent concealment "must show that the defendants concealed the conduct complained of ..." *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

In a private antitrust damage action, the *Seventh Circuit*, after finding that plaintiffs had failed to sustain their burden of showing, among other things, "the fraudulent concealment, mistake or misrepresentation which frustrated it," quoted with approval from another opinion: "Concealment by defendant only by silence is not enough. He must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry." *Laundry Equipment Sales Corp.* v. *Borg-Warner Corp.*, 334 F.2d 788, 792 (7th Cir. 1964), quoting *Crummer* v. *DuPont*, 255 F.2d 425, 432 (5th Cir. 1958).

In an early decision holding that the doctrine of fraudulent concealment applies to the antitrust statute of limitations, the *Eighth Circuit* made it clear that it was not adopting a failure to discover principle: "... [W]e are satisfied that there is a marked difference in tolling the statute of limitations because of the failure to discover, and tolling the limitation period because the parties who engaged in unlawful conduct (conspiracy or combination) are successful, through *affirmative action*, in concealing the cause of action itself." *Kansas City, Mo.* v. *Federal Pacific Elec. Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962)(fn. omitted; emphasis added). In the beginning of the opinion, the court noted: "It was specifically alleged that defendants, through *affirmative conduct*, had fraudulently concealed the existence of the conspiracies from plaintiff ..." *Id.* at 272 (emphasis added).

In a private antitrust action based on a conspiracy charge, the *Ninth Circuit* refused to toll the statute of limitations because plaintiffs had "not alleged specific facts showing that [defendants] engaged in affirmative conduct that fraudulently concealed the existence of a cause of action." *Hennegan* v. *Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986). The court specifically relied on an earlier decision requiring affirmative acts of concealment by defendant. *Rutledge* v. *Boston*

Woven Hose & Rubber Co., 576 F.2d 248, 249-50 (9th Cir. 1978). The court in *Rutledge* held that, "[t]o avoid the bar of limitation by invoking the concept of fraudulent concealment, the plaintiff must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Id.* at 250.

4. *Other Considerations Favoring the Affirmative Acts Standard.*

This review of the law of the Circuits shows that all of the Circuit Courts that have dealt with the issue, save one, have decided that the wrongful concealment element of the fraudulent concealment doctrine requires proof of affirmative acts to toll the antitrust statute of limitations. No Court of Appeals except the Second Circuit has rejected this standard.[6]

Congress had substantial policy considerations in mind when it enacted Section 4B in 1955 to prevent the bringing of civil

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[6] One commentator has made a comprehensive survey of the fraudulent concealment doctrine, discussing its various interpretations and applications in the context of fraud and the myriad of non-fraud cases. *See* Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard*, 71 Geo. L.J. 829 (1983). Significantly, on the basis of his study, Professor Marcus concluded: "Before tolling limitations periods, courts should insist on a showing of some wrongful behavior by the defendant that caused delay in filing suit and therefore outweighs the policies underlying statutes of limitations. Requiring proof of concealment performs this function." *Id.* at 872. He further pointed out that "to abandon concealment as an independent requirement undercuts the policies underlying the statute of limitations. Unless the plaintiff alleges something more against the defendant than the commission of the substantive wrong, the defendant should not be deprived of the protections of limitations and the courts should not be required to resolve ancient claims." *Id.* at 913.

Professor Marcus noted that, "Despite the growing importance of fraudulent concealment, it has received little attention from the Supreme Court or legal commentators. *Bailey* v. *Glover* did not carefully explain how the doctrine should be applied, and the Supreme Court has provided little meaningful guidance on the subject since that decision." 71 Geo. L.J. at 833.

antitrust actions that were more than four years old. During the period 1949-1955, Congress considered various bills providing a uniform limitation for the antitrust laws, to put an end to the confusion and forum shopping that resulted from the application of state statutes of limitations that varied from one to twenty years. Even though several of the bills (including the Administration's proposal) provided for a six-year period, Congress, after due consideration, decided in favor of a "uniform statute of limitations applicable to *all* private treble damage actions — and Government damage actions as well — of 4 years." H.R. Rep. No. 422, 84th Cong., 1st Sess., (1955), p. 7. (emphasis added). It selected the shorter period as " 'fair and equitable', observing that a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts." *Id.* at 7-8. The Congressional reports further stated that unduly prolonged antitrust damage proceedings would not be "conducive to effective and efficient enforcement of the antitrust laws." *Id.* at 9.

If the self-concealing conspiracy doctrine is accepted, however, it would undercut these Congressional policy considerations. Instead of repose and stability for business operations, the indefinite tolling of antitrust conspiracy cases would subject business concerns to lawsuits going back many years. The federal courts would experience a marked increase in stale antitrust claims of a questionable character. Certainly Congress never expected or intended that its legislation, designed to fix a maximum time within which to sue for antitrust damages, would be so interpreted as to defeat the very public policies it favored.

B. *The Acts Of A Conspirator Unbeknownst To A Co-Conspirator Should Not Be Imputed To The Co-Conspirator To Deny It A Statute Of Limitations Defense.*

The Second Circuit's ruling in *Hendrickson Brothers*, that criminal or tortious conduct of one defendant to conceal a conspiracy deprives the statute of limitations defense of another defendant will eviscerate the defense of statute of limitations in antitrust, and other, conspiracy actions. Surely one defendant could not affirmatively waive the statute of limitations for

another defendant. That being true, it is unfathomable how in *Hendrickson Brothers*, the Second Circuit could rule that the illegal conduct of Amfar, not known to Hendrickson, can result in a waiver by Hendrickson of its limitations defense, especially since Hendrickson concealed nothing and cooperated with the government's investigation into the same conduct at issue in this action.

The Second Circuit held that acts of concealment of the Amfar defendants, which the Court states were "in furtherance of the conspiracies", should be attributable to Hendrickson. (840 F.2d at 1085; App. 34). The Court reached its holding even though it concluded that "there was no evidence of affirmative acts by the other [non-Amfar] defendants to conceal the conspiracy" and implicitly found that the "other co-conspirators ... did not know of the actions [taken by Amfar]." (840 F.2d at 1084, 1085; App. 34). It was not alleged by the State – and the Circuit Court did not rule – that the conspiracy alleged by the State of New York included an agreement to engage in the destruction or concealment of the information committed by the Amfar defendants.

The Second Circuit relied on two criminal cases, *Lutwak* v. *United States*, 344 U.S. 604, 618 (1953) and *United States* v. *Ortiz-Rengifo*, 832 F.2d 722, 725 (2d Cir. 1987), for the proposition that a conspirator's action may be used against its co-conspirators if "they were acts in furtherance of the conspiracies charged." (840 F.2d at 1085; App. 34). Significantly, these two criminal cases do not hold that the acts of a conspirator that were *not* known by a co-conspirator – and were in furtherance of a plan of concealment distinct from the conspiracy alleged – are attributable to a co-conspirator. We know of no decision of the Court or of any court that so holds.

Indeed, every federal case addressing this issue has concluded that independent acts of concealment by one defendant do not toll the statute of limitations as to co-defendants who, like Hendrickson, did not participate in such acts. *See, e.g., Greenfield* v. *Kanwit*, 87 F.R.D. 129, 132 ("In each of the cases cited by [plaintiff] in which the doctrine [of fraudulent concealment]

has been applied, the running of the statute was tolled only as to the defendants who had committed the concealment. Here, however, [plaintiff] alleges no wrongdoing by [two co-defendants], and accordingly they are entitled to assert the defense"); *Cato* v. *South Atlantic & Gulf Coast District of the International Longshoremen's Association*, 364 F. Supp. 489, 493 (S.D. Tex.), *aff'd*, 485 F.2d 583 (5th Cir. 1973) (*per curiam*) ("Generally the acts of third parties in concealing a cause of action will not prevent the running of the limitations period as to the real defendant. The action by union officials can preserve plaintiffs' claim against the defendant district union, but it cannot save their claim against these [other] defendants"); *Philco Corp.* v. *Radio Corp. of America*, 186 F. Supp. 155, 163 n.10 (E.D. Pa. 1960)(since "[n]either of these defendants are alleged to have committed any affirmative act of concealment," to "hold them guilty of concealment would be illogical"); *see also Powell* v. *Radkins*, 506 F.2d 763, 765 n.5 (5th Cir.), *cert. denied*, 423 U.S. 873 (1975)("Fraud perpetrated by third-parties does not toll the statute").

Perhaps, most significantly, in *Western Paving*, the District Court ruled that the State of Colorado "failed to establish" that the alleged act of concealment of one conspirator Larry Corn (the submission of false noncollusion affidavits) should be imputed to [defendant] Western Paving." 630 F. Supp. at 209. In the instant action, the State of New York likewise failed to establish that Amfar's acts of concealment should be imputed to Hendrickson.

It has long been established that "[c]onspirators are chargeable with the acts of their fellows only if the acts are done in the furtherance of the joint venture as all understand it; they are not to be held liable for what some of the conspirators, unknown to the rest, do beyond the reasonable intendment of the common understanding." *Momand* v. *Universal Film Exchange*, 72 F. Supp. 469, 470 (D. Mass. 1947), *cert. denied*, 336 U.S. 967 (1949), citing *United States* v. *Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941)(L. Hand, J.). Thus, in order for Amfar's acts of concealment to be binding on Hendrickson, plaintiff was obligated to establish that Hendrickson agreed to cover up the underlying

scheme and that Amfar's acts were in furtherance of such an agreement.

However, the Court's charge and the special verdict form did not require that the affirmative acts be in furtherance of any common understanding. (*See* A1273, 49-50; App. 56-57, 62). More importantly, plaintiff adduced no evidence whatsoever to indicate the existence of any such understanding after the objectives of Hendrickson's alleged bid-rigging activities had been achieved. *See United States* v. *DeVaugn*, 579 F.2d 225 (2d Cir. 1978). On the contrary, as the proof established, Hendrickson cooperated with the government's investigation of the conspiracy by producing the records requested of them and there was no evidence at trial that Hendrickson attempted to obstruct the government's investigation. (A943-45; App. 58-60).

Implicit in the Second Circuit's opinion is a ruling that a subsidiary conspiracy to conceal may be implied from the conspirators' need for secrecy. The Supreme Court rejected such a ruling in *Grunewald* v. *United States*, 353 U.S. 391, 402 (1957), and held that acts of covering up

> cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators . . . Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.

The Second Circuit's decision in *Hendrickson Brothers* will "for all practical purposes wipe out the statute of limitations in conspiracy cases." *Grunewald* v. *United States*, 353 U.S. at 402. The Circuit Court's decision would allow the criminal acts of one defendant, not known to its co-defendants and committed years after the termination of the alleged conspiracy, to deprive the co-defendants of their statute of limitations defense. The Second Circuit's decision should be rejected by the Court.

CONCLUSION

The United States Circuit Court for the Sixth Circuit recently stated in *Pinney Dock and Transport Co.* v. *Penn Central Corp.*, *supra*, 838 F.2d at 1468, that the "Supreme Court has not recently had occasion to cite or otherwise discuss *Wood* v. *Carpenter* or *Bailey* v. *Glover*." Now is a most opportune time. This year alone, the Second Circuit in *Hendrickson Brothers*, the Sixth Circuit in *Pinney Dock* and the Tenth Circuit, sitting in banc in *Western Paving* have addressed – with conflicting results – the appropriate standard for applying the fraudulent concealment doctrine in antitrust actions.

The issues raised by this petition and the petition for a writ of certiorari filed last month by the Attorney General of Colorado in *Western Paving* have substantial implications in antitrust conspiracy actions and other federal conspiracy lawsuits.

In view of the conflict among the Circuits involving the issues raised herein and the significance of the issues in antitrust jurisprudence and a variety of other substantive areas of law, the Court should grant certiorari in this case to provide guidance on the law of fraudulent concealment.

Respectfully submitted,

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APPENDIX

App. 1

STATE OF NEW YORK,

Plaintiff-Appellee,

v.

HENDRICKSON BROTHERS, INC., Amfar Asphalt Corp., Francis Ambrosio, Anthony Farino, Jack Farino, and Lizza Industries, Inc.,

Defendants-Appellants,

Pratt & Pratt Inc., James J. Pratt, and Herbert Hochreiter,

Defendants.

Nos. 1086, 1088 and 1089, Dockets
86-9080, 87-7028 and 87-7068.

United States Court of Appeals,
Second Circuit.

Argued April 29, 1987.

Final Briefs Submitted Aug. 3, 1987.

Decided Feb. 16, 1988.

State brought civil antitrust suit against contractors and their officers for allegedly conspiring to rig bids on highway contracts. The United States District Court for the Eastern District of New York, Jacob Mishler, J., awarded State over $7,000,000 in treble damages, and contractors and their officers appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) witness' testimony of one corporate officer's statements describing conspiratorial group was admissible under coconspirator exception to hearsay rule contained in Federal Evidence Rule 801(d)(2)(E); (2) evidence supported finding that State had been injured by bid-rigging scheme, and thus State could recover treble damages; (3) jury's award was not an unreasonable estimate

of damages; (4) State could recover monies it paid on contracts representing amount of federal government's contributions; (5) mail fraud convictions of some of the defendants could be used against them as prima facie evidence of their participation in scheme; and (6) fraudulent concealment tolled statute of limitations.

Affirmed.

Joseph Opper, Asst. Atty. Gen., New York City (Robert Abrams, Atty. Gen. of the State of N.Y., Lloyd Constantine, Chief, Antitrust Bureau, Lawrence S. Kahn, Deputy Sol. Gen., George Sampson, Mark Moskovitz, Asst. Attys. Gen. New York City, on the brief), for plaintiff-appellee.

Milton S. Gould, New York City (Leon D. Lazer, Clifford Thau, David S. Tannenbaum, Shea & Gould, New York City, on the brief), for defendant-appellant Hendrickson Bros., Inc.

Paul F. Corcoran, Mineola, N.Y. (Michael H. Soroka, Speno Goldberg Moore Margules & Corcoran, P.C., Mineola, N.Y., on the brief), for defendants-appellants Amfar Asphalt Corp., Francis Ambrosio, Anthony Farino, and Jack Farino.

Roanne L. Mann, New York City (David N. Ellenhorn, Stein, Zauderer, Ellenhorn, Frischer & Sharp, New York City, on the brief), for defendant-appellant Lizza Industries, Inc.

Before FEINBERG, Chief Judge,
KEARSE and WINTER, Circuit Judges.

KEARSE, Circuit Judge:

Defendants-appellants Hendrickson Brothers, Inc. ("Hendrickson"), Amfar Asphalt Corp. ("Amfar"), Francis Ambrosio, Anthony Farino, Jack Farino ("Farino"), and Lizza Industries, Inc. ("Lizza"), appeal from so much of a final judgment entered in the United States District Court for the Eastern District of New York following a jury trial before Jacob Mishler, *Judge*, as awarded plaintiff State of New York ("State") (1) $7,455,000 in

treble damages against them for conspiracy to obtain highway construction contracts from the State at prices that were fixed and maintained at artificial and noncompetitive levels in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1982); (2) $375,000 in treble damages against Amfar, Ambrosio, Farino, Anthony Farino, and Lizza for conspiracy to fix prices on construction materials contracts awarded by Suffolk County ("County"), in violation of § 1 of the Sherman Act; and (3) $100 as a civil penalty against each defendant for the above conspiracies in violation of New York's Donnelly Act, N.Y. Gen.Bus.Law §§ 340-347 (McKinney 1968). On appeal, some or all of the appellants contend principally (1) that the district court erred (a) in giving estoppel effect to the mail fraud convictions of certain of the defendants and (b) in admitting certain statements as coconspirator admissions; and (2) that they were entitled to judgment in their favor notwithstanding the verdict ("n.o.v."), or in the alternative a new trial, on the grounds that (a) without the improperly admitted evidence, the proof was insufficient to support a finding of conspiracy, (b) the State's claims were barred by the statute of limitations, and (c) the State failed to prove that defendants' conduct caused it injury. Appellants also contend that even if the State did adequately establish liability and injury, it was entitled to recover only a fraction of the amount it was awarded with respect to the highway construction contracts because most of those costs were funded by the United States Government. Finding no merit in any of appellants' contentions, we affirm the judgment.

I. BACKGROUND

A. *The Parties and the Prior Criminal Proceedings*

At all pertinent times herein, Hendrickson, Amfar, Lizza, and defendant Pratt & Pratt Inc. ("Pratt Inc."), were New York corporations engaged in the construction business on Long Island, New York, which includes Suffolk County. Ambrosio, Farino, and Anthony Farino were shareholders of Amfar and were, respectively, its president, secretary, and treasurer. Defendant Herbert Hochreiter was president of Lizza; defendant James J. Pratt ("Guy Pratt") was president of Pratt Inc.

The State commenced the present action in June 1983 pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15 (1982). In its amended complaint, the State principally sought (1) treble damages on its own behalf, alleging that all six appellants, along with the three defendants who are not appellants, had entered into a combination or conspiracy to "submit collusive, noncompetitive and rigged bids" to the State in connection with several contracts awarded by the State's Department of Transportation ("NYSDOT") for highway construction in 1977 and 1978; and (2) treble damages on behalf of the County, alleging that Amfar, Ambrosio, Farino, Anthony Farino (collectively the "Amfar defendants"), Lizza, and Hochreiter had conspired to fix prices in connection with highway construction materials purchased by the County in 1978 and 1979 (the "1978 and 1979 materials contracts"). The complaint also alleged that the two conspiracies violated the Donnelly Act, N.Y.Gen.Bus.Law §§ 340-347.

Following commencement of this action, proceedings were largely stayed pending completion of a criminal case then pending against most of the defendants. The Amfar defendants, Guy Pratt, and Pratt Inc. had been indicted in April 1983 by a federal grand jury for, *inter alia*, mail fraud, in violation of 18 U.S.C. § 1341 (1982), in connection with the bidding on contracts awarded by NYSDOT and the County. Lizza and Hochreiter were added as defendants by a superseding indictment. After a trial on these charges ended in a hung jury, a second superseding indictment was filed, naming only Lizza and Hochreiter as defendants and charging them with, *inter alia*, 32 counts of mail fraud in connection with the rigging of one highway repair contract awarded by NYSDOT in 1977 (the "Shelter Island" contract) and the rigging of the 1978 and 1979 materials contracts awarded by the County. Lizza and Hochreiter were convicted on these charges, and Lizza was fined $52,000 and ordered to forfeit $1,000,000; Hochreiter received a sentence that included a fine, forfeiture, and imprisonment. Their convictions were affirmed on appeal. *United States v. Lizza Industries, Inc.*, 775 F.2d 492 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1459, 89 L.Ed.2d 716 (1986). In the meantime, Guy Pratt and Pratt Inc. had pleaded guilty to ten

counts of mail fraud in connection with a NYSDOT contract awarded in 1978 (the "Wantagh Avenue" contract).

B. *The Evidence in the Present Action*

Following conclusion of the criminal cases, proceedings in the present action were resumed, and the State's claims were tried to a jury. The principal issues included whether there was an overall conspiracy among all the defendants with respect to the NYSDOT contracts at issue here and whether there had been fraudulent concealment by the defendants sufficient to toll the four-year statute of limitations on the State's federal antitrust claims. The evidence, viewed generally in the light most favorable to the State, showed the following.

NYSDOT's normal practice was to award all highway construction contracts through a process of competitive bidding. Each bid form submitted by a contractor contained a statement certifying that the bid was not the result of collusion with other bidders. When a contract was awarded, the winning bidder signed a contract that reaffirmed the absence of collusion. As discussed in greater detail in Part II.B.1. below, the State accepted the noncollusion representations at face value and often revised its prior estimates of construction costs on the basis of the bids received.

During the period covered by the complaint, five highway construction contracts were awarded by NYSDOT to one of the defendant companies: the Veterans Memorial Highway ("Vets Highway") contract awarded to Lizza in February 1977, the Port Jefferson contract awarded to Amfar in June 1977, the Shelter Island contract awarded to Lizza in October 1977, the Long Island Expressway ("Expressway") contract awarded to Hendrickson in April 1978, and the Wantagh Avenue contract awarded to Pratt Inc. in October 1978. Virtually all of the losing bids on these five contracts were submitted by Hendrickson, Amfar, Lizza, or two other companies identified by an Amfar employee as members of a bid-rigging conspiracy. The 1978 and 1979 materials contracts were awarded by the County to Lizza; Amfar was a losing bidder on each.

The State introduced in evidence the mail fraud convictions of Lizza and Hochreiter to prove that those defendants had participated in a scheme to defraud the State by rigging bids on the Shelter Island contract and to defraud the County by rigging bids on the 1978 and 1979 materials contracts. It introduced the mail fraud convictions of Pratt Inc. and Guy Pratt to prove that the Pratt defendants had participated in a scheme to defraud the State by rigging bids on the Wantagh Avenue contract.

To support its contention that all of the defendants had participated in an overall conspiracy to rig the NYSDOT contracts, the State relied principally on the testimony of former Amfar vice president and controller Joseph LoMonte. LoMonte testified that in early 1977, Amfar, one of the smaller highway construction contractors on Long Island, had been approached by Frank Mascali & Sons ("Mascali"), a New York City contractor. Mascali asked Amfar to join it in making a joint-venture bid on the Vets Highway project, seeking to retaliate against Lizza for violating a territorial division agreement. Amfar decided against joining Mascali in such a bid. Amfar president Ambrosio then told LoMonte that the bidding on the Vets Highway contract had been rigged, that Lizza would win the contract, and that "as a reward" for not bidding with Mascali, Lizza would give Amfar a very lucrative subcontract on the project. There promptly followed a pre-bid agreement between Lizza and Amfar, subcontracting to Amfar one mile of the 13-mile Vets Highway job at a price of $899,911. LoMonte testified that had Amfar bid on this subcontract, its normal bid would have been $511,588, which would have included its profit. Thus, for not bidding on the Vets Highway job, Amfar was given an *excess* profit of $338,000 on a $512,000 job.

LoMonte testified that after the Vets Highway contract was awarded to Lizza, Amfar secretary Jack Farino told him that Farino had attended a meeting in Farmingdale, Long Island, at which he learned "how the bids [we]re being rigged, who the individuals or the corporations were that were involved." Farino told LoMonte that the bids were rigged by a group of five contractors referred to as the "Club of Five" (or the "Club"),

and that the five members of the Club were Lizza, Hendrickson, J.D. Posillico ("Posillico"), Zara Construction ("Zara"), and one other contractor that LoMonte was unable to recall. Thereafter, Ambrosio informed LoMonte that officials of two labor unions also were members of the bid-rigging scheme. While Farino was in Farmingdale, which was the location of the offices of Posillico and one of the unions involved, the Club members held a meeting behind closed doors, which Farino was not allowed to attend.

Farino described to LoMonte how the bid rigging was to work. Amfar would be told on what contract it was to be low bidder, and it would be required to prepare a bid. After Amfar arrived at its proposed bid figure, it was to communicate to "Farmingdale" the number that the other contractors' bids must exceed. Amfar was advised not to "get too greedy," *i.e.*, it was to limit the excess profit included in its bid to 20-25% and was not to seek excess profits of 40-50%. Later review by Ambrosio of bids submitted by other co-conspirators led him to the conclusion that most of them were submitting bids that included excess profits higher than the 20-25% benchmark.

Prior to the bidding deadline for the Port Jefferson job, awarded in June 1977, Ambrosio told LoMonte that it had been determined that Amfar would be the low bidder. He instructed LoMonte to develop bidding figures so that they could "forward the numbers on to Farmingdale." The two then arrived at a final bid of $1.2 million. However, prior to communicating this figure to Farmingdale and submitting it to the State, Amfar had it reviewed by Hendrickson. Hendrickson advised that the $1.2 million figure was "way too low." Accordingly, Amfar increased its bid to $1.79 million and informed "Farmingdale" that the accommodation bids by other contractors should be above $1.8 million. Amfar was awarded the Port Jefferson contract at $1.79 million. The other bidders on this project, whose bids ranged from $1.835 million to $2.199 million, were Hendrickson, Lizza, and Posillico.

On the Shelter Island project, awarded in October 1977, Amfar prepared an accommodation bid at the request of Lizza one day before the bidding deadline. Ambrosio told LoMonte that

Lizza was to be the low bidder on this job and would furnish Amfar with the figure above which Amfar was to bid. Lizza's bid for the Shelter Island job was $2.648 million; Amfar's accommodation bid was $3.282 million. LoMonte testified that even $2.6 million was beyond the amount in which Amfar could obtain a performance bond from its surety company, and absent the request of Lizza, Amfar would not have bid on this project. The only other bidder on the project was Hendrickson. Lizza was the low bidder and was awarded the contract.

In April 1978, Amfar submitted an accommodation bid on the Expressway project, this time at the request of Hendrickson. Although Amfar had previously been approached by a company from the midwest to bid on this project, it had no intention of doing so. Thereafter, however, Hendrickson informed Amfar that Hendrickson would be the low bidder and that it wanted Amfar to submit an accommodation bid. Hendrickson did not provide LoMonte with its final figure for this project until near midnight on the night before the bidding deadline. When LoMonte, who had traveled to Albany in order to be on hand to submit Amfar's bid to the State when it was completed, called Ambrosio that evening to advise him of the delay, Ambrosio directed him to "stay there, when you do receive the number, whatever number they give you, put it in and submit the bid." Eventually, Hendrickson gave LoMonte a figure of $9.3 million, and Amfar submitted a bid in the amount of $9.412 million. Amfar's bid was far in excess of its bonding capacity, and LoMonte, at Ambrosio's instruction, telephoned Amfar's bonding broker to reassure him that the bid was not a serious one. Hendrickson was the low bidder on the Expressway project and was awarded the contract. In addition to Amfar, the only other bidder was Posillico.

Each bidder on a NYSDOT contract was required to submit with its bid a certified check payable to the State, as a form of guarantee that the contractor, if it turned out to be the low bidder, would sign the contract and perform the work at the prices listed in the bid. NYSDOT's practice was to retain the checks of both the low bidder and the second-lowest bidder until the company awarded the contract provided a performance bond.

For the Expressway project, Amfar's check was for approximately $200,000, and as Amfar was the second-lowest bidder, its check was retained by the State for a period of time. In the meantime, since it borrowed the money required to fund the certified checks needed to accompany its bids, Amfar was paying interest on the $200,000. LoMonte testified that when he raised the matter of the interest cost with Ambrosio, Ambrosio told him that "while it was fairly expensive, not to worry about it, we would just add it on to the next bid that they gave us, we would just add it on to that cost."

The bidding deadline for the Wantagh Avenue contract was October 19, 1978. On October 18, Guy Pratt informed Farino, Anthony Farino, and LoMonte that Pratt Inc. would be the low bidder. Guy Pratt asked that Amfar submit an accommodation bid because he was apprehensive that his other accommodation bidders were not going to submit their bids and he wanted to be absolutely certain that there would be at least one. Although Amfar had theretofore done nothing whatever to calculate the cost of the Wantage Avenue job, it put together a bid using figures supplied by Pratt Inc. LoMonte arranged to have the required bidding check certified after banking hours, and Amfar submitted the requested accommodation bid. Hendrickson also submitted a bid. Pratt Inc. was the low bidder and was awarded the contract.

LoMonte also described preparing Amfar's accommodation bids on the 1978 and 1979 materials contracts awarded by the County, on which Lizza was intended to be the low bidder. On the 1978 contract LoMonte made a clerical error in preparing the bid and thereby nearly caused Amfar to be awarded the contract as low bidder. At Farino's instruction, LoMonte called the County to request that Amfar be allowed to withdraw its bid. LoMonte gave a false explanation for the request. Also at Farino's instruction, LoMonte telephoned Lizza's president Hochreiter to apologize for the near foul-up and to assure him that Lizza would indeed be recognized as the low bidder. The following year, Lizza informed Farino that Lizza was to be low bidder on the 1979 materials contract to be awarded by the County in January 1979 and again asked Amfar to submit an

accommodation bid. Farino passed this along to LoMonte and repeatedly admonished him not to make a mistake, as he had the year before, that could cause Amfar to be the low bidder. Lizza was awarded both of these contracts.

In order to meet defendants' statute-of-limitations defense, the State sought to show that there had been fraudulent concealment of its claims until well within the four-year period of limitations provided by § 4B of the Clayton Act, 15 U.S.C. § 15b (1982). It relied in part on the certificates of noncollusion submitted by each bidder, on other affirmative acts of concealment by the Amfar defendants, and on testimony by a federal investigator, who had uncovered the bid-rigging scheme, that he had not informed the State or the County of the scheme until some time in the 1980's.

C. *The Verdicts in the Present Action*

The court submitted special interrogatories to the jury on the existence of the two conspiracies alleged in the complaint, their memberships, the statute-of-limitations defense, and damages. The jury found that each of the nine defendants had entered into an overall conspiracy to rig bids on the NYSDOT contracts at issue, and that the Amfar defendants, Lizza, and Hochreiter had entered into a conspiracy to fix prices on the 1978 and 1979 materials contracts awarded by the County. The jury found that neither the State nor the County was aware of the conspiracies prior to June 16, 1980; that the coconspirators took affirmative steps to conceal the existence of the two conspiracies; and that neither the State nor the County, by exercising due diligence, could have discovered the existence of those conspiracies prior to that date.

On the question of damages, the jury found that the State had been injured in the following amounts on the NYSDOT contracts:

Vets Highway	$ 584,000
Port Jefferson	67,000
Shelter Island	644,000
Expressway	1,113,000
Wantagh Avenue	77,000
Total	$2,485,000

It found that the County had been injured in the total amount of $125,000 on the 1978 and 1979 materials contracts.

The Court trebled each amount awarded by the jury and entered judgment in favor of the State for $7,455,000 against all defendants on the NYSDOT claims, and for $375,000 against the Amfar defendants, Lizza, and Hochreiter on the County claims. In addition, it imposed a civil penalty of $100 on each defendant pursuant to § 342-a of the Donnelly Act.

Defendants' motions for judgment n.o.v. or a new trial were denied. Pratt Inc. and Guy Pratt paid the State $275,200 in settlement of the judgment against them. The remaining defendants appealed. Hochreiter has since withdrawn his appeal.

II. DISCUSSION

Appellants, singly or in combination, make a variety of arguments on appeal. They contend principally (1) that LoMonte's Club-of-Five testimony was inadmissible hearsay and that, without that testimony, the evidence was insufficient to prove the existence of an overall conspiracy; (2) that the evidence was insufficient to establish that the State suffered any injury as a result of the defendants' activities; (3) that the trial court erred in refusing to reduce the $2,485,000 award on the NYSDOT contracts to account for the partial federal funding of the highway construction costs; and (4) that the action should have been dismissed on statute-of-limitations grounds because the State did not adequately prove fraudulent concealment. In addition, Lizza and the the Amfar defendants argue that the criminal convictions of Lizza, Hockreiter, Pratt Inc., and Guy Pratt were not admissible in evidence; the Amfar defendants argue that, if the judgments were admissible against the convicted defendants, the court should have granted the Amfar defendants a separate trial. We have considered all of appellants' contentions and have found them to be without merit.

A. *The Admissibility of LoMonte's Club-of-Five Testimony*

LoMonte's testimony recounting Farino's description of the Farmingdale meeting of the Club of Five and identification of

the Club members was admitted, over hearsay objections, against Farino as an admission, *see* Fed.R.Evid. 801(d)(2)(A), and against Amfar as a statement of its employee within the scope of his employment, *see* Fed.R.Evid. 801(d)(2)(D). At the close of the evidence, the district court ruled that the statements of Farino were also admissible against all of the other defendants as co-conspirator statements made in furtherance of an overall conspiracy. *See* Fed. R. Evid. 801(d)(2)(E). Lizza and Hendrickson challenge this ruling, contending principally that there was insufficient evidence, independent of the Club-of-Five testimony itself, to establish the existence of an over-all conspiracy rather than merely a number of discrete conspiracies, each directed at a particular NYSDOT contract. Lizza contends that the ruling unfairly caused it to be held liable for injury to the State on two contracts on which Lizza was neither low bidder nor an accommodation bidder. In addition, Lizza and Hendrickson contend that, even if an overall conspiracy was shown, the testimony was inadmissible because Farino had no personal knowledge of what was said at the Club meeting and the statements he uttered were themselves hearsay. We reject these contentions.

[1] Under Rule 801(d)(2)(E), an out-of-court statement is not hearsay with respect to a given party if it was made by a co-conspirator of that party in furtherance of the conspiracy. In order to admit such a statement, the trial court is required to find, as preliminary facts under Fed.R.Evid. 104(a), that a preponderance of the evidence supports the conclusions that there was a conspiracy, that both the declarant and the party against whom the statement is offered were members of it, and that the statements were made in furtherance of the conspiracy. *See, e.g., United States v. DeJesus,* 806 F.2d 31, 34-35 (2d Cir.1986), *cert. denied,* — U.S. —, 107 S.Ct. 1299, 94 L.Ed.2d 155 (1987). In making its preliminary factual determinations, the court may take into account not only the other evidence before it, but also the proffered out-of-court statements themselves if those statements are sufficiently reliable in light of independent corroborating evidence. *Bourjaily v. United States,* — U.S. —, 107 S.Ct. 2775, 2781-82, 97 L.Ed.2d 144 (1987). The trial court's determinations of these preliminary facts

may not be disturbed unless they are clearly erroneous. *Id.* 107 S.Ct. at 2782. We have no difficulty in upholding the findings of the trial court in the present case.

[2] Appellants do not contend that the evidence failed to establish the existence of any conspiracy whatever; nor could they sensibly do so, for it is plain that there was conspiratorial bidding on each of the five NYSDOT contracts at issue here. There was, at the very least, agreement between Amfar and Hendrickson on the Port Jefferson contract, between Amfar and Lizza on the Shelter Island contract, between Amfar and Hendrickson on the Expressway contract, and between Amfar and Pratt on the Wantagh Avenue contract. Lizza's payment to Amfar of an inordinately high amount on the Vets Highway subcontract, together with the correct prediction of Lizza's being low bidder on the Vets Highway contract, permitted an inference of collusion on that contract as well. The pattern of defendants' activity with respect to the five contracts and the very nature of bid-rigging conspiracies made it more likely than not that these were not, as Lizza and Hendrickson would have it, isolated, single-contract conspiracies for which only the direct participants could be held liable.

First, by its nature, a bid-rigging enterprise normally requires a significant number of participants. In order to predetermine who will win a given auction it is desirable to coopt virtually all companies that are thought likely to submit low bids. *See generally Colorado ex rel. Woodard v. Western Paving Construction Co.*, 833 F.2d 867, 881(10th Cir.1987). Moreover, as discussed in greater detail in Part II.B.1. below, after receiving bids, NYSDOT customarily considered whether it had received a sufficient number of bids to satisfy statutory requirements that the contract be awarded after a competitive auction. Thus a bid-rigging enterprise had to have enough members to ensure that the State would feel it had enough bids on any given contract to warrant awarding the contract immediately rather than calling for new bids.

The pattern of conduct shown in the present action further supported the inference that a number of companies had confidence in the efficacy of their scheme to rig bids on the NYSDOT

contracts, which in turn supported the inference that there was a sizeable conspiracy. For example, though the contracts were normally advertised four-to-six weeks before the bidding deadline, three different contractors (Lizza on Shelter Island, Hendrickson on Expressway, and Pratt on Wantagh Avenue) sought and obtained accommodation bids from Amfar by contacting it or providing the necessary information just one day before the bids were due. The ease with which accommodation bids were arranged at the eleventh hour supported an inference (a) that the predetermined low bidders had confidence that they could count on obtaining accommodation bids without hesitation, and (b) that those belatedly contacted had confidence that they too would one day be guaranteed a low bidder position. Sufficient accommodation and reciprocity guarantees could not be provided by one or two companies acting alone but rather suggested the existence of a larger organization. Further, several facts were inexplicable unless the accommodation bidders had assurance that they would profit in some illicit way. These included the willingness of a company (*e.g.*, Hendrickson on Port Jefferson, Amfar on three other contracts) to expend time in preparing a bid that it knew would be a loser; Amfar's willingness to submit bids that were far greater than its bonding capacity; and Amfar's willingness to incur substantial interest expense on its accommodation bids. Finally, the very facts that (a) prior to the bid letting on each of the five NYSDOT contracts at issue here, Amfar was informed as to precisely which of the four defendant contractors would be the low bidder, and (b) in each instance the identified contractor was in fact the low bidder strongly indicated the existence of one conspiracy that included at least those four corporate defendants and their key officers. The inference that such a conspiracy existed was further supported by the fact that, of the 19 bids submitted to the State on these five NYSDOT contracts, 17 were submitted by the four corporate defendants, Zara, and Posillico.

Thus, given the evidence as to the actual operation of the bid rigging on the NYSDOT contracts and the reasonable inferences drawn from the manner of operation, we conclude that the trial court did not commit clear error in its preliminary finding that

a preponderance of the evidence – even ignoring the Club-of-Five testimony itself – indicated there was an overall conspiracy to rig the bids on the five NYSDOT contracts at issue. In light of the facts that Lizza was awarded a plurality of these contracts and that Hendrickson was a bidder on all of them, we see no error in the inference that Lizza and Hendrickson, along with the Amfar defendants and the Pratt defendants, were among the conspiracy's members. Nor can there be any question that Farino's statements to LoMonte, describing how Amfar would participate in the bid rigging and identifying others who would participate, were "in furtherance of" the conspiracy. Thus, the requirements of Rule 801(d)(2)(E) were satisfied.

[3] We find no merit in the contention that the court should have excluded Farino's statements pursuant to Fed.R.Evid. 805 because they themselves contained hearsay statements by other unidentified declarants. Rule 805 provides for the exclusion of "[h]earsay included within hearsay" unless the included statement, as well as the encompassing statement, is covered by some exception to the hearsay rule. Whether or not Rule 805 is applicable when the encompassing statement is defined as nonhearsay, as is true of coconspirator statements, and the only hearsay is a statement contained in the nonhearsay statement, *compare Cedeck v. Hamiltonian Federal Savings & Loan Ass'n*, 551 F.2d 1136, 1138 (8th Cir.1977) (hearsay within coconspirator statement excludable unless it meets a hearsay exception), *with United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir.1984) (upholding admissibility without reference to such exceptions), we reject appellants' contention because the challenged contents of Farino's statements were not themselves hearsay. First, we note that LoMonte's description of what Farino told him did not refer to statements by others to Farino, and a portion of Farino's report to LoMonte may well have been based on independent observation. Farino himself had been at a meeting in Farmingdale, and though he was not allowed to attend the discussion that was conducted behind closed doors, there was no evidence that prevented the jury from inferring that he had identified the participants in the closed meeting by visual recognition of those who entered or left the closed room. Further, though some or even all, of Farino's statements to LoMonte

may have been premised on what Farino was told, the instructions to Farino as to the manner in which Amfar was to conduct itself in the bid-rigging operation, and with whom it was to deal, were not hearsay but rather were properly admissible as a "verbal act" describing the making or terms of the conspiratorial agreement. " 'The hearsay rule does not exclude relevant testimony as to what the contracting parties said with respect to the making or the terms of an oral agreement.' " 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(c)[01], at 801-72 (1987) (quoting *Creaghe v. Iowa Home Mutual Casualty Co.*, 323 F.2d 981, 984 (10th Cir.1963) (emphasis deleted)). *See* Fed.R.Evid. 801(c) Advisory Note (the "entire category of 'verbal acts' " is excluded from the definition of "hearsay"). Nor is the fact that Farino was not present at the closed meeting an impediment to admission of the instructions he was given as to how Amfar was to conduct itself and with whom it was to deal. There is no requirement that the hearer of a verbal act have first-hand knowledge of how the other parties to the contract arrived at their willingness to agree to those terms. *Cf. United States v. Ammar*, 714 F.2d 238, 254 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983); *United States v. McLernon*, 746 F.2d at 1106 (personal knowledge not required as foundation for admission of coconspirator statements pursuant to Rule 801(d)(2)(E)).

In sum, we reject appellants' contention that the Club-of-Five testimony should have been excluded. The independent evidence corroborated Farino's statement as to the members and operations of the Club sufficiently to warrant the admission of those statements in evidence against all of the defendants as statements of their coconspirator in furtherance of the conspiracy. With the admission of those statements, there was ample evidence from which the jury, which was repeatedly instructed that it must determine whether there was a single overall conspiracy as the State alleged or merely discrete little schemes as the defendants argued, could infer that all of the defendants participated in one conspiracy to rig the bidding on the five NYSDOT contracts.

B. *Injury and Damages*

All of the appellants contend that they were entitled to judgment n.o.v. on the ground that the State failed to present any evidence of the market value of the goods and services covered by the awarded contracts and hence failed to prove that it was in any way injured by the actions of the defendants, or if injured, to what extent. Alternatively, they contend that the State was not entitled to recover damages for so much of the cost of the NYSDOT contracts as was federally funded. We are unpersuaded.

1. The Fact of Injury

[4] An antitrust plaintiff seeking treble damages under § 4 of the Clayton Act is required to prove that he suffered actual injury in his business or property as a result of the defendant's violation of the antitrust laws. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S.Ct. 1923, 1927, 68 L.Ed.2d 442 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 1571 n. 9, 23 L.Ed.2d 129 (1969); *Klinger v. Baltimore & Ohio Railroad Co.*, 432 F.2d 506, 516 (2d Cir. 1970). This requirement may be met by "proof of *some* damage flowing from the unlawful conspiracy." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. at 114 n. 9, 89 S.Ct at 1571 n. 9 (emphasis in original).

In reviewing a contention that the plaintiff's failure to prove injury entitles the defendant to judgment n.o.v., we must view the evidence in the light most favorable to the party in whose favor the verdict was returned, and that party must be given the benefit of all reasonable inferences that might have been drawn in his favor from the evidence. *See Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 712 (2d Cir.1983); *Simblest v. Maynard*, 427 F.2d 1,4 (2d Cir.1970). The denial of judgment n.o.v. may be overturned only if "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Id.*

[5] The evidence in the present case was ample to permit the jury to infer that the State had been injured by the defendants' bid-rigging scheme. It was easily inferrable from LoMonte's testimony that the members of the conspiracy made bids that were higher than they would have been if there had been no conspiracy. For example, on the Port Jefferson contract, on which Amfar was intended to be the low bidder, Amfar prepared a bid of $1.2 million, which was then reviewed by Hendrickson; Hendrickson informed Amfar that the bid was too low, and, accordingly, Amfar raised its bid to $1.79 million. The jury could similarly infer that the amount bid by Lizza on the Vets Highway contract was inflated over what would have been bid in the absence of a bid-rigging conspiracy. Lizza gave Amfar a subcontract on that job as a reward for not joining Mascali in a bid against Lizza. That subcontract gave Amfar some $388,000 more than its normal profit on that subcontract, and the jury could infer that Lizza's bid was inflated by at least that amount. From the instructions Amfar received to use a benchmark of 20-25% for its excess profits when it was the predetermined low bidder, and the evidence that Ambrosio had reviewed other contractors' bids and determined that Amfar's coconspirators were in fact overcharging by more than that amount, the jury could infer that the coconspirators commonly included in their bids a profit component that was at least 20-25% higher than it would have been in the absence of the bid rigging.

For each planned highway construction contract, the State prepared confidential cost estimates to assist it in planning; the estimates were based in part on its experience with bids by contractors on recent projects. NYSDOT engineer Fredrick Muhlig, whose duties included reviewing all bids submitted on NYSDOT contracts, testified that NYSDOT used these estimates in deciding whether to award the contract or to postpone the project. Many of the bids received did not exceed the estimate by more than 10%. Where this was the case, the State conducted only a general examination, consisting of a check to see that enough contractors had bid on the project and a doublecheck of its prior estimate to be sure there was no major error on its part. For those contracts on which the low bid exceeded the engineers' estimate by more than 10%, NYSDOT also considered

these factors but in addition considered many others and reconsidered whether to proceed with the project, assessing whether proceeding as scheduled was critical from a safety standpoint and whether it was likely that lower bids would be received if the project were postponed. In some instances, the State simply revised its estimate upward on the theory that "the competitive bids [were] a better reflection of costs in the current market." The State accepted at face value the bidders' noncollusion representations and operated on the assumption that the bids received reflected the operation of free market forces without any collusion among bidders.

On four of the five NYSDOT contracts at issue here, the low bids exceeded the State's initial estimates by more than 10%; the State's review of those four resulted in upward revisions of the estimates. Even with the revisions, all of the bids submitted on all five contracts were higher than the final estimates. A total of 19 bids were received on these five contracts; all but two of them were submitted by the defendant companies, Zara, and Posillico.

The evidence that the coconspirators' practice was to include excess profits of 20-25% in their bids was applicable not only to the NYSDOT contracts but also to the materials contracts awarded by the County. Thus, though the State presented no evidence as to the County's engineering estimates of the projected cost of the materials, the 20-25%-benchmark evidence permitted the jury to infer that the materials contracts too were awarded at prices higher than they would have been if there had been no bid rigging.

In all, the evidence was ample to permit the jury to find that the bid-rigging conspiracies resulted in the low bidders' submitting bids that were well in excess of what they would have been in the absense of bid rigging, and that the State and the County therefore were in fact injured by the conspiracies.

2. The Jury's Calculation of Damages

Appellants also contend that they were entitled to judgment n.o.v., or at least a new trial, because the evidence was insufficient

to permit the jury to arrive at an adequately precise quantification of the damages suffered by the State and the County. They contend that the amounts awarded by the jury were arbitrary and speculative. We disagree.

[6,7] Where the antitrust violation is a price-fixing conspiracy, the measure of damages to one of the coconspirators' customers is the difference between the prices actually paid and the prices that would have been paid absent the conspiracy. *E.g.*, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489, 88 S.Ct. 2224, 2228-29, 20 L.Ed.2d 1231 (1968); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980); *Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d 380, 385-86 (4th Cir.1982), *cert.denied*, 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983). The normal frame of reference for "what would have been" paid is the market value of the goods or services in the absence of the collusive action. Where, however, there is a dearth of market information unaffected by the collusive action of the defendants, the plaintiff's burden of proving damages is, to an extent, lightened, for "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931); *see J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 568, 101 S.Ct. at 1930; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946). Although the jury is not allowed to base its damages assessment on speculation or guesswork, it is entitled to

> make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every

> case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Id. at 264, 66 S.Ct. at 580 (quoting *Story Parchment Co., v. Paterson Parchment Paper Co., 282 U.S. at 564, 51 S.Ct. at 251); see J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 566-67, 101 S.Ct. at 1929-30 ("it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted") (quoting *Hetzel v. Baltimore & Ohio Railroad Co.*, 169 U.S. 26, 39, 18 S.Ct. 255, 260, 42 L.Ed. 648 (1898)).

[8] In the present case, the State suggested two theories upon which damages on the highway construction contracts might be calculated. It argued that it should be awarded either the gross profits received by the defendants on each contract they were awarded, or the difference between the amounts of the low bid and the NYSDOT engineering estimate on each of those contracts. On the materials contracts awarded by the County, the State argued that the jury should calculate damages on the basis that the low bidders added 25% excess profits to their bids. The trial court instructed the jury that

> the measure of damages is the difference between what the State paid on the [NYS]DOT contracts and what the price would have been had there been no overall conspiracy to rig bids as alleged in the complaint. And similarly, on the second claim that refers to the County of Suffolk Department of Works contracts, the difference between what the County of Suffolk paid and what they would have paid if there had not been a collusive agreement as alleged in the complaint.

(Trial Transcript ("Tr.") 2379.)

On the NYSDOT contracts, the jury awarded amounts ranging from $67,000 to $1,113,000. In each instance, the amount awarded was one-half of the difference between the NYSDOT engineer's estimate and the low bid. Given the unequivocal evidence that the coconspirators artificially raised the amounts of their bids, and the evidence that in some instances the State revised its estimates upward either because it discovered a flaw in its original estimate or because it assumed that the bidding more accurately reflected the market value of the services required for the project, it appears that the jury's award was not an unreasonable estimate of damages.

[9] On the materials contracts awarded by the County, the jury seems also to have made an adjustment it considered equitable and reasonable, again awarding the State an amount less than what was requested. Though the State argued that the overcharges described in LoMonte's testimony warranted a recovery of $500,000 on the materials contracts, the jury awarded one-quarter of that amount. It may well be that the jury made the steeper discount of the amount requested on these contracts because it had not been presented with engineers' estimates on the materials contracts as it had been on the NYSDOT contracts. While the proof of the amount of damage was thus less definite with respect to the materials contracts, the jury was not confronted with an all-or-nothing proposition, for it did have before it the evidence that the coconspirators' bids on the materials contracts included at least 20-25% excess profits. Given the adequacy of the proof that the State suffered some injury, the jury was not required to deny all recovery simply because it determined that the State was not entitled to the entire amount requested.

In sum, we cannot accept appellants' contention that the jury's decision to award the State various fractions of the amounts demanded was not an equitable and reasonable one, for to do so in the circumstances here would permit defendants to profit by their wrongdoing at the expense of the person injured.

3. The Matter of Federal Funding

Finally, appellants contend that the State was not entitled to recover some 75% of the moneys it paid on the NYSDOT

contracts because the federal government contributed at least that proportion of the moneys paid to the defendants on those contracts. We are unpersuaded.

[10] In general, the person who has purchased directly from those who have fixed prices at an artificially high level in violation of the antitrust laws is deemed to have suffered the antitrust injury within the meaning of § 4 of the Clayton Act, and hence may recover the entire amount of the illegal overcharge even if some or all of the overcharge may have been passed on to others. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. at 491-94, 88 S.Ct. at 2230-32. The Supreme Court has construed "*Hanover Shoe* as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734-35, 97 S.Ct. 2061, 2069, 52 L.Ed.2d 707 (1977). The principal rationale for this judgment was that antitrust treble-damage actions should not be complicated by a need to trace the effects of the overcharge with respect to such matters as prices, costs, and the potentially different behavior of all the pertinent variables in the absence of the overcharges. The Court has noted that a passing-on defense "might" be permitted "where 'an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged. . . .' " *Id.* at 724 n. 2, 97 S.Ct. at 2064 n.2 (quoting *Hanover Shoe*, 392 U.S. at 494, 88 S.Ct. at 2232). The reason for this possible exception is that the "customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." *Illinois Brick*, 431 U.S. at 736, 97 S.Ct. at 2070.

[11] Within this framework, the district court properly refused to allow defendants to explore and claim credit for the portions of the NYSDOT contracts that were paid for by the federal government. There is no question that the direct purchaser from the defendant contractors was the State and that

if there was any depletion of the federal coffers the federal government's injury was derivative rather than direct. The government's obligations ran to the State, which acquired contractual rights to reimbursement for moneys it expended on highway construction upon satisfaction of various conditions imposed by federal law. *See* 23 U.S.C. § 110 (1982). In discharging its contractual obligation to repay a share of the State's highway construction expenses, the government dealt only with the State, making its payments to "such official or officials . . . as may be designated by the State highway department and authorized under the laws of the State to receive public funds of the State." *Id.* § 121(e). The government neither dealt with the contractors nor owed them any funding duty. Its relationship to the highway contractors is plainly analogous to that of an indirect purchaser.

We see little merit in any suggestion that the NYSDOT contracts were in effect "cost-plus" contracts as to which a passing-on defense might be available. Muhlig testified that the federal government allotted the State a certain amount of money "for projects in certain cat[e]gories," such as repair of interstate highways, repair of bridges, and so forth. If the State reached the limit of its funding within a certain category, it had no option to draw funds from amounts left over in another category. Plainly, the matter of federal funding is a complicated one. In the absence of an offer of proof by appellants of a contract showing that the effect of their overcharges was "essentially determined in advance," the trial court did not err in curtailing defendants' pursuit of such questions as the extent to which the federal funds spent on overcharges would have been usable, absent the overcharges, for other highway construction work in the same category, what conditions would have to be met for such use, and whether such conditions could or would have been met. The very pursuit of these lines of questioning would have defeated the primary purpose of the rule prohibiting passing-on defenses, which is to eliminate any need to explore such complexities.

Appellants cite *State of Tennessee ex rel. Leech v. Dole*, 749 F.2d 331 (6th Cir.1984) ("*Leech*"), *cert.denied*, 472 U.S. 1018,

105 S.Ct. 3480, 87 L.Ed.2d 615 (1985), for the proposition that the State simply has no legal interest in the funds it receives from the federal government. Their reliance is misplaced. In *Leech*, Tennessee, which had received funds in settlement of a civil antitrust action alleging bid rigging, sought to enjoin the federal government from setting off, against the current highway funds allocated to Tennessee, an amount claimed by the federal government as its share of the settlement. The Sixth Circuit held that as a matter of equity, the government was entitled to a share of the settlement since the federal funds had been paid "by mistake" on the assumption that the settling contractors had complied with the competitive bidding requirements of the Federal-Aid Highways Act, 23 U.S.C. § 112 (1982). *See Leech*, 749 F.2d at 336; *but see United States v. Azzarelli Construction Co.*, 647 F.2d 757, 762 n. 5 (7th Cir.1981) (state's contractual right to federal funds not defeated by bid rigging among contractors so long as contracts were awarded through competitive procedures required by § 112). Though *Leech* may stand for the proposition that the federal government may recover from a state some portion of the state's recovery from the bid riggers, it does not purport to give the bid riggers any right to a reduction of their own liability on account of the federal government's right to recover from the state.

With respect to the five NYSDOT contracts at issue here, if the federal government is eventually found to be entitled to receive reimbursement or credit from the State for the portion of the contracts that were federally funded, the purpose of the antitrust laws will have been served: the wrongdoers will have lost their unlawful gains to the parties that were injured directly and indirectly. If the federal government obtains no portion of the State's recovery, it is possible that the State will have received a windfall; but the State plainly has a greater right to any windfall than have the defendant wrongdoers.

C. *The Use of the Prior Convictions*

Lizza and the Amfar defendants contend that they are entitled to a new trial because they were unfairly prejudiced by the State's introduction of the mail fraud convictions of Lizza,

Hochreiter, Pratt Inc., and Guy Pratt. They argue principally that the trial court improperly gave estoppel effect to the convictions, and that even giving the convictions prima facie effect rather than preclusive effect would have been improper because the jury in the criminal case could have convicted without finding bid rigging. The Amfar defendants also contend that once the court decided to allow the State to use the judgments of conviction against the convicted defendants, it should have allowed a separate trial of the claims against the Amfar defendants. None of these contentions has any merit.

[12] First, though the district court might well have accorded the judgments estoppel effect against the convicted defendants, *see, e.g., Dorman v. Higgins*, 821 F.2d 133, 136 (2d Cir.1987) (party other than government may assert collateral estoppel against convicted defendant with respect to facts necessarily determined in criminal proceeding); *Gelb v. Royal Globe Insurance Co.*, 798 F.2d 38, 43 (2d Cir.1986) (same), *cert. denied*, — U.S. —, 107 S.Ct. 1608, 94 L.Ed.2d 794 (1987), it is plain from the trial record that the court did not in fact give the criminal convictions preclusive effect. Rather, the court allowed the State to use the judgments only as prima facie evidence that each of the convicted defendants had engaged in the collusive scheme or schemes with respect to which his or its guilt was established in the criminal case. When the judgments were first received in evidence, the court informed the jury that they were prima facie evidence, which the court said meant "some evidence," that the convicted defendants had participated in those schemes. (Tr. 1552, 1553.) In its final instructions, the court instructed the jury that "prima facie evidence is proof that establishes the fact *in the absence of proof to the contrary.* So, *if* there is no proof to the contrary, you must accept that as the fact." (Tr. 2378 (emphasis added).) Accordingly, the record provides no support for the contention that the judgments of conviction were given preclusive effect.

[13] Second, we find no error in the trial court's ruling that the judgments of conviction sufficiently determined facts relevant to the State's civil claims to permit use of the judgments by the State in the present action. A prior judgment of conviction

may be used as prima facie evidence in a subsequent civil suit only with respect to matters of fact or law "necessarily decided by the conviction and the verdict on which it was based." *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569, 71 S.Ct. 408, 414, 95 L.Ed. 534 (1951); *cf.* Fed.R.Evid. 803 (22) (hearsay rule does not require exclusion of "[e]vidence of a final judgment, entered after a trial or upon a plea of guilty . . . adjudging a person guilty of a [felony], to prove any fact essential to sustain the judgment"). What issues were decided in the criminal case is a question of law that "must be determined by the trial judge hearing the treble-damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts." *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. at 569, 71 S.Ct. at 414.

[14] In the present case, Judge Mishler determined as a matter of law that the verdicts of guilt against Lizza and Hochreiter were premised on findings that they had engaged in collusive bidding on the Shelter Island contract awarded by NYSDOT and the two materials contracts awarded by the County, and that the pleas of guilty by Pratt Inc. and Guy Pratt established that the Pratt defendants had engaged in collusive bidding on the Wantagh Avenue contract. As the judge who presided over the criminal proceedings as well, Judge Mishler was especially well situated to determine what those proceedings had established. In so doing, he looked in part to the instructions he had given the jury in the case against Lizza and Hochreiter. Those instructions stated that "[w]hat the evidence must show beyond a reasonable doubt is that the members of the scheme . . . came to a mutual understanding to accomplish the bid rigging scheme" (Trial Transcript in *United States v. Lizza Industries, Inc.*, Cr. No. 83-00159 (S-2) (E.D.N.Y.), 2097-98), and that the indictment alleged there were two aspects to the bid-rigging scheme:

> One, that the scheme to defraud these agencies was through bid collusion and the concealment of material facts relating to the bid collusion, and,

> Two, a scheme to obtain money by means of false and fraudulent repr[e]sentations that no bid collusion occurred in connection with the letting of the contracts.
>
> Such a plan or cause of action involving either or both of these aspects, would constitute a scheme or artifice within the meaning of the statute.
>
> It is not necessary that the Government prove all of the details alleged in the indictment concerning the precise nature, purpose, object, goal and means of achieving the scheme or that the alleged scheme actually succeeded in defrauding someone.
>
> In order to find the existence of the unlawful scheme, you need only find—and that means the Government prove [*sic*] beyond a reasonable doubt—that there existed a common plan to defraud involving bid collusion as I have previously explained in these instructions, including either the concealment of material facts or the making of false or fraudulent representations relating to the bid collusion.

(*Id.* at 2096-97.) These instructions made it clear that bid rigging was an integral part of each aspect of the mail fraud schemes alleged, for neither aspect could be established without there having been bidding collusion. Indeed, this Court in affirming the judgments of conviction of Lizza and Hochreiter stated that "[t]he proof at trial showed that Lizza Industries, a major Long Island construction firm, and Herbert Hochreiter, Lizza's president and part-owner, were active participants in a large bid-rigging conspiracy. The conspirators colluded on the bidding of four publicly funded contracts for the repair and building of public roads and highways on Long Island." *United States v. Lizza Industries, Inc.*, 775 F.2d at 494.

In sum, the indictment, the evidence, the charge, and the affirming opinion of this Court warranted the determination by Judge Mishler that the judgments of conviction against Lizza

and Hochreiter necessarily determined that those defendants had participated in a conspiracy to rig bids on the Shelter Island and materials contracts. Appellants may not properly complain that the trial court allowed the use of those convictions against those defendants as prima facie evidence of that participation.

There is no greater basis for the attack on the admission of the judgements convicting Pratt Inc. and Guy Pratt. The Pratt defendants pleaded guilty before Judge Mishler. He reviewed the superseding informations under which they entered their pleas, which alleged mail fraud in connection with bid rigging on the Wantagh Avenue contract as well as other fraudulent acts. The Court had heard the testimony of Guy Pratt at the trial that ended in a hung jury, and had accepted the pleas of guilty on the basis of that testimony, without requiring further allocution. Judge Mishler was uniquely qualified to determine what facts were established by the Pratt defendants' guilty pleas, and appellants have presented us with no basis for disputing the determination that those pleas conceded that Pratt Inc. and Guy Pratt had engaged in bid rigging with respect to the Wantagh Avenue contract.

The recent decision of the Supreme Court in *McNally v. United States*,— U.S. —, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), invoked by appellants for the proposition that the criminal convictions at issue here were invalid, is not pertinent to the present case. In *McNally*, the Court ruled that the mail fraud statute, 18 U.S.C. § 1341, does not encompass fraudulent schemes that merely violate the "intangible right of the citizenry to good government." 107 S.Ct. at 2879. Thus, the Court overturned the convictions of Kentucky politicians who had been convicted of mail fraud for their participation in an insurance fee-splitting scheme, stating that the mail fraud statute is designed to reach fraudulent use of the mails to deprive the victims of tangible property, not merely of "the right to have the Commonwealth's affairs conducted honestly." *Id.* at 2877. The mail fraud convictions of Lizza, Hochreiter, Pratt Inc., and Guy Pratt were convictions for depriving the State and the County of money. There was no suggestion that the State or County officials had in any way acted dishonestly; to the contrary, the indictments

alleged that the scheme was to defraud the agencies, not to corrupt them, and the jury was instructed accordingly.

[15, 16] Finally, we find no merit in the Amfar defendants' contention that, since they had not been convicted of mail fraud and the convictions of others were to be admitted, the State's claims against them should have been tried separately and that they are entitled to a new trial because they suffered from a prejudicial spillover effect. The decision whether to grant a severance motion is committed to the sound discretion of the trial court. *See Chicago, Rock Island & Pacific Railroad Co. v. Williams*, 245 F.2d 397, 404 (8th Cir.), *cert. denied*, 355 U.S. 855, 78 S.Ct. 83, 2 L.Ed.2d 63 (1957); 1 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 105[01], at 105-9 (1986). We see no abuse of discretion here, where the motion for severance was first made after trial was commenced, the granting of the motion would have resulted in a second trial that would be largely identical with respect to issues and proof, and any prejudice to the Amfar defendants could be minimized by giving limiting instructions. Judge Mishler took great pains to instruct the jury repeatedly that each judgment was admissible only against the defendant who had been convicted, that it could be used only to show his or its participation in a conspiracy with respect to the contract or contracts at issue in his or its criminal case, and that the conviction could not be used against any other defendant for any purpose whatever. We see no basis for believing the jury disregarded these limiting instructions. In light of the weight of the evidence against the Amfar defendants, which was damning with respect to every contract at issue in this case, the suggestion that the verdict against them was the result of prejudicial spillover is entirely frivolous.

D. *The Statute-of-Limitations Defense*

Section 4B of the Clayton Act provides that "[a]ny action to enforce any cause of action under [the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. The present lawsuit was commenced on June 16, 1983; the State's causes of action accrued prior to June 16, 1979, since the latest of the contracts

at issue in the present case was awarded prior to that date. In order to escape the statutory time bar, the State sought to show that defendants had fraudulently concealed the State's claims from it, thereby tolling the statute of limitations until the State's discovery of the claims. Hendrickson and Lizza contend that they were entitled to judgment dismissing the State's claims because the State, which adduced no proof of any affirmative acts of concealment by them, as contrasted with such acts by the Amfar defendants, failed to establish fraudulent concealment by Hendrickson and Lizza. We disagree because the record adequately established fraudulent concealment by all defendants and because the jury was entitled to find that the affirmative acts of concealment by Amfar were attributable to the other defendants as well.

[17] As described by the Supreme Court more than a century ago, the purpose of the fraudulent-concealment doctrine is to prevent a defendant from "concealing a fraud, or ... committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349, 22 L.Ed. 636 (1874). Describing the elements of this equitable doctrine, the Court stated that

> when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

Id. at 349-50. Thus, we have held that an antitrust plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part. *E.g.*, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460 (2d Cir.1974); *see Baskin v. Hawley*, 807 F.2d

1120, 1131 (2d Cir.1986) (claim for pension benefits); *Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir.1985) (employment discrimination claim).

As indicated in *Bailey v. Glover*, the plaintiff may prove the concealment element by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing. The passing off of a sham article as one that is genuine is an inherently self-concealing fraud, whether what is passed off is a fake vase sold as a real antique, *see Hobson v. Wilson*, 737 F.2d 1, 33-34 & n. 102 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985), or a collusive bid purporting to reflect genuine competition, *see Colorado ex rel. Woodard v. Western Paving Construction Co.*, 833 F.2d at 881 ("*Western Paving*"). As we have discussed in Part II.A. above, a bid-rigging conspiracy is the kind of enterprise that requires a number of participants and, in order that there be adequate incentive for their participation, agreement as to a number of contracts. Thus, the enterprise is designed to endure over a period of time. In order to endure, it must remain concealed from the victim of the collusive bids. As the Tenth Circuit put it in *Western Paving*,

> [i]f a bidrigging conspiracy exists, it must remain concealed to be successful. Any knowledge of the conspiracy would lead plaintiff to seek action immediately and result in collapse of the conspiracy. Furthermore, unlike many conspiracies, a bidrigging conspiracy is likely to exist for an extended period of time. To be attractive to all bidders, the conspiracy must cover more than one job—or must provide some quid pro quo to the "losing" bidders. The very nature of a bidrigging conspiracy makes it likely that future bids will also be rigged.... These additional bidrigging activities not only provide the compensation for one of the "losing" bidders in the original bid but also help to conceal the bidrigging activity on the other bids. Such subsequent fraudulent acts may in themselves amount to affirmative acts of concealment.

Id.

[18] The bid-rigging scheme at issue here fit squarely within this framework. The NYSDOT contracts conspiracy had at least six contractor members and involved contracts awarded in 1977 and 1978. Each of the four corporate defendants was awarded at least one of the contracts at issue. The members of the conspiracy that were intended to be low bidders were advised that they should limit the excess profits included in their bids to 20-25% and not approach 40-50%, presumably in order not to draw unwanted scrutiny. The submission of accommodation bids was designed in part to make the low bid appear reasonable. The bidders were required to submit affidavits representing that they had not engaged in collusion in submitting their bids, and it was obvious that discovery of the bid rigging would have defeated the enterprise. Since the primary element of a claim under § 1 of the Sherman Act is a "contract, combination . . . or conspiracy," and the defendants' scheme necessarily included concealment of the existence of their conspiracy, proof of the conspiracy itself sufficed to prove concealment by the coconspirators.

We are persuaded also that the record contains sufficient evidence of affirmative acts of concealment to support the State's effort to avoid the statute of limitations. After Amfar entered into the bid-rigging scheme, Ambrosio instructed LoMonte to remove from the office the books and documents that reflected Amfar's participation in the scheme and the extra profits thereby earned. In July 1978, after LoMonte had been arrested on an unrelated matter, which resulted in the seizure of a ledger documenting Amfar's unreported cash transactions, including kickbacks to several of the coconspirators, he met with Ambrosio, Farino, and Anthony Farino to assess the situation. They discussed the documents that reflected the bid rigging and agreed that "it wouldn't be wise for any of us to talk." The Farinos suggested that the best way to get rid of the telltale documents would be to burn them. Many of the documents were thereafter burned; Amfar purchased a shredder to destroy the rest. The four men also agreed that LoMonte would give false testimony if called before a grand jury, and he did so.

While there was no evidence of affirmative acts performed by the other defendants to conceal the conspiracy, other than the inherently necessary submission of the noncollusion affidavits, the trial court properly instructed the jury that if it found that the bid-rigging conspiracy continued in existence at the time of the Amfar defendants' coverup activities, it could find that those activities were also attributable to the other members of the conspiracy. The record amply permitted the inference that both the NYSDOT contracts conspiracy and the County materials contracts conspiracy remained in existence at the time the Amfar defendants destroyed documentary evidence and initiated the fabrication of false testimony, for these coverup activities began in July 1978. The latest NYSDOT contract at issue here was awarded in October 1978, and the 1979 materials contract was awarded by the County in January 1979; both were proven to have been awarded on the basis of collusive bidding. Given the continuation of the two conspiracies and the fact that secrecy was essential to their continued existence, it was entirely appropriate for the court to allow use of the Amfar defendants' actions against the other coconspirators—even if the latter did not know of the actions—since they were acts in furtherance of the conspiracies. *See, e.g., Lutwak v. United States*, 344 U.S. 604, 618, 73 S.Ct. 481, 489, 97 L.Ed.593 (1953) (noncommunicative acts of conspirator admissible against coconspirator if relevant); *United States v. Ortiz-Rengifo*, 832 F.2d 722, 725 (2d Cir.1987) (same).

In sum, the State sufficiently proved the concealment by the defendants of the conspiracies alleged in the complaint, both because the bid-rigging was self-concealing and because the Amfar defendants' affirmative acts of concealment were properly admissible against all of the defendants.

The State also adequately proved that it remained ignorant of the existence of the NYSDOT contracts conspiracy until well after June 16, 1979, *i.e.*, a point within the four-year limitations period. Muhlig, the engineer who was in charge of reviewing all highway construction bids for NYSDOT, testified that NYSDOT assumed that the bids it received represented "a free market competitive noncollusive situation." The bidders'

noncollusion certifications certainly did nothing to disturb that assumption. Muhlig first learned of the allegations of bid rigging on Long Island in April 1983, when the criminal indictment was returned. County engineer Richard J. LaValle, who was in charge of reviewing the materials contracts awarded by the County, testified that he first learned of the allegations of bid rigging with respect to the 1978 and 1979 materials contracts in the spring of 1983. FBI special agent Daniel Melore testified that he had begun an investigation of Long Island highway construction contracts in February 1978. His best estimate was that he did not interview State employees and obtain documents from them until 1982 or 1983. He may have talked to County employees somewhat earlier, but his testimony indicated that the County interviews did not occur earlier than 1981. Melore testified that he did not disclose to County or State employees before April 1983 either the targets of the FBI's investigation or the fact that the subject of the investigation was bid rigging.

The trial court properly instructed the jury that the State was required to establish by a fair preponderance of the evidence that its failure to commence the action within four years of the letting of the contracts was "through no fault of its own," and that it had "exercised due diligence under all the circumstances." The court also told the jury that the State had not met its burden if it had a suspicion of collusive bidding on a single contract or any other information that should have alerted it to its claim of an overall conspiracy. We find no error in the court's instructions. The jury found that neither the State nor the County could have, by exercising due diligence, discovered the existence of the conspiracies alleged in the complaint. Since it was permissible for the jury to infer that the responsibilities of Muhlig and LaValle made it likely that they would be the first officials to become alert to the conspiracies at issue here, the jury was entitled to conclude from all the evidence that no State or County official knew of the bid rigging until 1981 at the earliest. The record provides no basis for overturning its verdict.

E. *Other Contentions*

Appellants have made a variety of additional arguments that do not require extended discussion.

[19] The contention of Lizza and the Amfar defendants that the trial court erred in instructing the jury with respect to the failure of Hochreiter, Ambrosio, Farino and Anthony Farino to testify at trial is without merit. The court noted that none of these individuals had testified on behalf of themselves or the corporate defendants, and it instructed the jury that

> [i]f you find that any of the defendants who failed to appear had information on any issues in this case which were peculiarly within his or its knowledge, then you may infer from such failure to appear that had the individual testified, his testimony, would be adverse to the position of that particular defendant. You cannot draw an unfavorable inference against other defendants because a particular defendant did not appear. It may only be drawn against that defendant.

(Tr. 2338.) This instruction was entirely proper. *See, e.g., Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-26, 59 S.Ct. 467, 473-74, 83 L.Ed. 610 (1939) (antitrust defendants' failure to tender the testimony of those of their officers who were in a position to know whether defendants had agreed on a course of concerted action was "itself persuasive that their testimony, if given, would have been unfavorable").

The contention of Anthony Farino that he was entitled to judgment n.o.v. because there was no evidence to connect him to the alleged conspiracies is entirely frivolous. LoMonte testified that Anthony, Amfar's treasurer, was at all times kept informed of significant developments in the bid-rigging schemes, that he attended the meeting at which Guy Pratt asked Amfar to submit an accommodation bid on the Wantagh Avenue job, and that he was a driving force behind Amfar's destruction of evidence of the bid-rigging schemes. And as indicated above, the jury was entitled to take into account Anthony's failure to testify in his own behalf and to infer from that failure that he would not have been able to testify truthfully that he had not been a member of the conspiracies. In sum, the evidence was adequate to permit a rational juror to conclude that Anthony

was more likely than not a knowing participant in the alleged conspiracies.

[20,21] We reject appellants' contention that the district court had no jurisdiction to assess the $100 per defendant penalties imposed under the Donnelly Act, N.Y. Gen.Bus.Law § 342-a. Although federal courts have no jurisdiction to enforce the criminal laws of the states, they do have jurisdiction to enforce state penalties that are civil in nature. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 270-71, 56 S.Ct. 229, 230-31, 80 L.Ed. 220 (1935). Since New York treats the penalties under § 342-a as civil, *see People v. Elmhurst Milk & Cream Co.*, 116 Misc. 2d 140, 150-51, 455 N.Y.S.2d 473, 480-81 (Sup.Ct.Kings Co. 1982), the district court had jurisdiction to impose them.

Lizza also contends that since the federal government may benefit financially from the State's recovery in this action, the jury's damage award against it was improper because it duplicated the fine and forfeiture Lizza had been ordered to pay the government in the criminal proceeding. This contention is wholly without merit since Congress plainly has the power to impose both criminal and civil sanctions for the same conduct. *E.g. United States v. $2,500 in United States Currency*, 689 F.2d 10, 12 (2d Cir.1982), *cert. denied*, 465 U.S. 1099, 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984); *United States v. Professional Air Traffic Controllers Organization*, 653 F.2d 1134, 1142 (7th Cir.), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981).

[22,23] Finally, we reject appellants' argument that the jury's verdict on the NYSDOT contracts should be reduced by the amount the Pratt defendants paid the State in settlement of the judgment herein. An amount recovered by a plaintiff from a coconspirator in settlement of the former's antitrust claims is not deductible from the amount of damages determined by the jury, though it may be deductible from the damages award after it has been trebled. *E.g., Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 130 (2d Cir.1980), *aff'd*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330

(1982); *Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d at 391-95; *Flintkote Co. v. Lysfjord*, 246 F.2d at 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957). Here, since the settlement occurred after the entry of the judgment, the Pratt defendants' payment does not require a reduction even of the treble damages awarded in the judgment. It is, of course, clear that the State is not entitled to recover an item of damage from one defendant that it has already collected from a codefendant, *see, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348, 91 S.Ct. 795, 811, 28 L.Ed.2d 77 (1971); but there is no indication in the record before us that the State intends to seek collection of more than the total amount of the judgment entered in its favor. If it does attempt to do so in the future, the nonsettling defendants will be entitled to a defense of satisfaction to the extent of the Pratt defendants' settlement payment, *see Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d at 391; *Hydrolevel Corp. v. American Society of Mechanical Engineers*, 635 F.2d at 130, and may assert that defense in the district court.

We have considered all of the other arguments advanced by appellants and have found them to be without merit.

CONCLUSION

The judgment of the district court is in all respects affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 7th day of April one thousand nine hundred and eighty-eight.

STATE OF NEW YORK,

Plaintiff-Appellee,

v.

HENDRICKSON BROTHERS, INC., AMFAR ASPHALT CORP., FRANCIS AMBROSIO, ANTHONY FARINO, JACK FARINO and LIZZA INDUSTRIES, INC.,

Defendants-Appellants.

No. 86-9080, 87-7028, 87-7068

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Hendrickson Brothers, Inc., Amfar Asphalt Corp., Francis Ambrosio, Anthony Farino, Jack Farino and Lizza Industries, Inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

– against –

AMFAR ASPHALT CORP., HENDRICKSON BROTHERS, INC. LIZZA INDUSTRIES, INC., PRATT & PRATT, INC., FRANCIS AMBROSIO, ANTHONY FARINO, JACK FARINO, HERBERT HOCHREITER, JAMES J. PRATT

Defendants.

JUDGMENT
CV 83-2598 JM

A memorandum of decision and order of Hon. Jacob Mishler, United States District Judge, having been filed on December 09, 1986, directing the Clerk of the Court to enter judgment on the verdict after a jury trial in favor of the State of New York and against all defendants in the sum of $7,455,000.00 on the first claim and $900.00 on the third claim, and in favor of the County of Suffolk and against defendants Amfar Asphalt Corp., Francis Ambrosio, Anthony Farino, Jack Farino, Lizza Industries, Inc. and Herbert Hochreiter in the sum of $375,000.00 on the second claim, it is

ORDERED and ADJUDGED that the State of New York shall recover from Amfar Asphalt Corp., Hendrickson Brothers, Inc., Lizza Industries, Inc., Pratt and Pratt, Inc., Francis Ambrosio, Anthony Farino, Jack Farino, Herbert Hochreiter and James J. Pratt the sum of $7,455,000.00 on the first claim and the sum of $900.00, representing a civil penalty of $100.00 against each

defendant, on the third claim, for a total of $7,455,900.00; and that the County of Suffolk shall recover the sum of $375,000.00 from defendants Amphar Asphalt Corp., Francis Ambrosio, Anthony Farino, Jack Farino, Lizza Industries, Inc. and Herbert Hochreiter on the second claim.

Dated: Uniondale, New York
December 17, 1986

ROBERT C. HEINEMANN
Clerk of the Court

By: _____
JOSEPH DI TALIA
Deputy-Clerk-in-Charge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK, CV 83-2598

Plaintiff,

– against –

ORDER

AMFAR ASPHALT CORP., HENDRICKSON BROTHERS, INC. LIZZA INDUSTRIES, INC., PRATT & PRATT, INC., FRANCIS AMBROSIO, ANTHONY FARINO, JACK FARINO, HERBERT HOCHREITER, JAMES J. PRATT

Defendants. December 9, 1986

All defendants move pursuant to Fed.R.Civ.P. 50(b) for judgment notwithstanding the verdict and pursuant to Fed.R.Civ.P. 59(a) for a new trial.

The motions are in all respects denied, and it is

SO ORDERED.

_____

U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

— against —

AMFAR ASPHALT CORP., HENDRICKSON BROTHERS, INC., LIZZA INDUSTRIES, INC., PRATT & PRATT, INC., FRANCIS AMBROSIO, ANTHONY FARINO, JACK FARINO, HERBERT HOCHREITER, JAMES J. PRATT

Defendants.

CV 83-2598

Memorandum of Decision and Order

November 20, 1986

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MISHLER, District Judge

Plaintiff State of New York moves for partial summary judgment on the issue of liability on its claim against defendants Lizza Industries, Inc. ("Lizza"), Herbert Hochreiter ("Hochreiter"), Pratt & Pratt, Inc. ("Pratt Inc.") and James J. Pratt ("Pratt") for violation of the Sherman Antitrust Act, 15

U.S.C. § 1. Plaintiff also seeks full summary judgment against defendants Lizza, Hochreiter, Pratt, Inc. and Pratt on its claim for civil penalties under the Donnelly Act, N.Y. Gen. Bus. Law § 342(a).

Defendants Lizza and Hochreiter cross-move for an order (1) directing the plaintiff State of New York to make an election prior to trial, to proceed on its claim for damages either under Section 4 of the Clayton Act, 15 U.S.C. § 15, or under Section 342-a of the Donnelly Act, N.Y. Gen. Bus. Law §§ 340 *et seq.*, and (2) for summary judgment pursuant to Fed.R.Civ.P. 56 dismissing plaintiff's claim for the assessment of penalties under Section 342-a of the Donnelly Act.

Plaintiff's complaint in this action alleges a conspiracy among the defendants and others to obtain highway construction contracts from the New York State Department of Transportation ("NYSDOT") and the Suffolk County Department of Public Works ("SCDPW") at prices which were fixed and maintained at an artificial and noncompetitive level in violation of the Sherman Act, 15 U.S.C. § 1,[1] and the Donnelly Act, N.Y. Gen. Bus. Law §§ 340 *et seq.*[2]

Defendants Lizza and Hochreiter were convicted after a jury trial on charges of mail fraud (18 U.S.C. §§ 1341 and 1342) and RICO violations (18 U.S.C. § 1962(a)) for bid rigging on NYSDOT and SCDPW contracts. *United States v. Herbert Hochreiter and Lizza Industries, Inc.*, 83 CR 00159(S-2), *aff'd*, 775 F.2d 492 (2d Cir. 1985), *cert. denied*, __ U.S. __, 106 S. Ct. 1459 (1986). Lizza was fined $52,000 and ordered to forfeit $1,000,000. Hochreiter was sentenced to two years in prison, fined $62,000, and ordered to forfeit $40,000 and his 30% stock interest in Lizza.

Defendant Pratt, Inc., by its president, defendant Pratt, pled guilty to ten counts in a superseding information charging mail fraud in obtaining a NYSDOT contract. Pratt, Inc. was fined $10,000.

DISCUSSION

Plaintiff's Motion for Summary Judgment

Plaintiff claims that Lizza's and Hochreiter's criminal convictions for mail fraud and RICO violations and Pratt, Inc.'s plea of guilty to mail fraud charges constitute a finding or an admission of guilt by Lizza, Hochreiter, Pratt Inc., and Pratt[3] to acts of bid rigging. Plaintiff argues that since bid rigging is a per se violation of the antitrust laws[4] the doctrine of collateral estoppel bars relitigation of this issue in this action.

In opposing plaintiff's summary judgment motion, defendants Lizza and Hochreiter argue that their criminal convictions only estop them from relitigating those issues that were "actually and necessarily decided by the prior verdicts," and that issues necessary to a finding of liability on their part in this action were not decided in their criminal trial. Thus, they contend they are not precluded from litigating the issue of liability for antitrust violations in this action. In addition, Lizza and Hochreiter argue that plaintiff's claim is barred by the statutes of limitation under both the Clayton and Donnelly Acts.[5]

Defendant Pratt argues that Pratt, Inc.'s plea of guilty to mail fraud charges does not estop him from litigating the issue of his liability in this action. Defendant Pratt, Inc. argues that its plea of guilty to mail fraud is not the equivalent of a plea of guilty to or an admission of acts constituting antitrust activity. Defendants Pratt and Pratt, Inc. also claim that plaintiff's action is barred by the statutes of limitation under the Clayton and Donnelly Acts.

In exercising our discretion we deny plaintiff's motion for summary judgment because the issues raised in the motion are closely meshed with issues to be tried and summary disposition of these issues would not materially expedite the proceedings. Although the language of Fed.R.Civ.P. 56(c) appears to mandate the dismissal of an action whenever the requirements of the rule are met,[6] it has long been recognized that "a motion for summary judgment is always addressed to the discretion of the court."

Perma Research & Development Co. v. Singer Co., 308 F. Supp. 743, 750 (S.D.N.Y. 1970).

> [E]ven if a district judge feels that summary judgment in a given case is technically proper, sound judicial policy and the proper exercise of judicial discretion may prompt him to *deny* the motion and permit the case to be developed fully at trial. The ultimate legal rights of the movant can always be protected in the course of or even after trial.

Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979) (emphasis in original).

Courts have frequently denied summary judgment motions where the movant has satisfied the technical requirements of Fed.R.Civ.P. 56 on the grounds that granting the motion would not expedite the litigation since "[the] part of [the] action . . . ripe for summary judgment . . . is intertwined with another claim that must be tried." *Taylor v. Rederi A/S Volo*, 374 F.2d 545, 549 (3d Cir. 1967). *See Powell v. Radkins*, 506 F.2d 763, 765 (5th Cir.), *cert. denied*, 423 U.S. 873, 96 S. Ct. 140 (1975); *Toyoshima Corp. v. General Footwear, Inc.*, 88 F.R.D. 559, 560 (S.D.N.Y. 1980); *In Re Franklin National Bank Securities Litigation*, 478 F. Supp. 210, 223 (E.D.N.Y. 1979). In such a situation "[t]o grant summary judgment would not save time or shorten the trial, since it must be conducted in any event." *Dunham-Bush, Inc. v. Mills*, 72 F.R.D. 42, 46 (S.D.N.Y. 1976).

Granting plaintiff's motion for partial summary judgment on the issue of liability on its claim for violation of the Sherman Act and full summary judgment on its claim for violation of the Donnelly Act against defendants Lizza, Hochreiter, Pratt, and Pratt, Inc. would not obviate the need for a trial. Plaintiff's complaint in this action alleges a common scheme among *all* the named defendants in connection with bid rigging on NYSDOT contracts, and a scheme among defendants Amfar Asphalt Corp., Francis Ambrosio, Anthony Farino, Jack Farino, Lizza, and Hochreiter in connection with SCDPW contracts.

Even if the court granted plaintiff's motions for summary judgment against Lizza, Hochreiter, Pratt, and Pratt, Inc., much of the same evidence would be introduced at the civil trial involving the remaining defendants. Thus, the trial will not be appreciably lengthened by denying plaintiff's motions for summary judgment, nor considerably shortened by granting plaintiff's motion. *See Taylor v. Rederi A/S Volo, supra*, 374 F.2d at 550. Where one claim "is inextricably woven to other claims which are destined for determination by the trier of fact, the action is better left fully intact." *Berman v. Royal Knitting Mills, Inc.*, 86 F.R.D. 124, 126 (S.D.N.Y. 1980).

Plaintiff's motion for partial summary judgment on the issue of liability on its claim for violation of the Sherman Act and full summary judgment on its claim for violation of the Donnelly Act against defendants Lizza, Hochreiter, Pratt, and Pratt, Inc. is in all respects denied.

Defendants' Motion for an Order Directing an Election of Remedies

Lizza and Hochreiter argue that Section 342-a of the Donnelly Act (which incorporates the fines which may be assessed in a criminal prosecution under § 341) precludes the state from recovering both treble damages under the Clayton Act and civil penalties under the Donnelly Act.

Section 342-a, captioned "Recovery of civil penalty by attorney-general" provides in pertinent part:

> In lieu of any penalty otherwise prescribed for a violation of a provision of this article . . . the attorney-general may bring an action in the name and in behalf of the people of the state against any person . . . or against a corporation . . . to recover a penalty in the sum specified in section three hundred forty-one of this article for the doing in this state of any act herein declared to be illegal, or any act in, toward or for the

> making or consummation of any contract, agreement, arrangement or combination herein prohibited . . . .

The statute limits the exposure of a violator to either criminal fines or civil monetary penalties for violation of the Donnelly Act. *People v. Elmhurst Milk & Cream Co.*, 116 Misc. 2d 140, 455 N.Y.S.2d 473, 480-81 (Sup. Ct. 1982); *People v. Gold Medal Farms, Inc.*, 113 Misc. 2d 574, 449 N.Y.S.2d 618, 620 (Sup. Ct. 1982). It does not, however, restrict New York's attorney general from seeking treble damages under the federal antitrust laws while at the same time pursuing a civil penalty under New York State's antitrust statute. In the event the State prevails on its federal antitrust claim, the amount of the award and the sentences previously imposed for mail fraud and RICO violations will be taken into consideration in fixing the amount of the civil penalty awarded under the Donnelly Act.

Defendants' Motion to Dismiss Plaintiff's Claim for Civil Penalties Under the Donnelly Act

Defendants also seek summary judgment dismissing plaintiff's claim for civil penalties under the Donnelly Act. Defendants argue that Section 342-a of the Donnelly Act precludes an action for civil penalties against a defendant who has been criminally prosecuted for violation of the antitrust laws.[7]

The cases cited by defendants in support of their argument merely hold that the New York State Attorney General cannot simultaneously maintain both a civil action and criminal prosecution against a defendant under the Donnelly Act. *See People v. Elmhurst Milk & Cream Co., supra*, 455 N.Y.S.2d at 480-81; *People v. Gold Medal Farms, Inc., supra*, 449 N.Y.S.2d at 619-21. The cases do not go so far as to preclude the award of civil penalties under the Donnelly Act against individuals and corporations that have been criminally prosecuted under the federal antitrust laws.

Defendants also argue that an award of civil penalties under the Donnelly Act would violate due process notions of fundamental fairness and would constitute a "windfall recovery" for the

state given the penalties that have already been imposed on defendants as a result of their criminal convictions. We find these arguments unpersuasive.

Defendants Lizza's and Hochreiter's motion for an order directing an election of remedies and for summary judgment dismissing plaintiff's claim for civil penalties under the Donnelly Act is in all respects denied.

Statute of Limitations Claim

Although defendants interpose the statute of limitations as an affirmative defense in their answer and repeat the claim in opposing plaintiff's summary judgment motion, it is not clear from the moving papers whether defendants seek dismissal of the action based on statute of limitations. Defendants argue that plaintiff's antitrust claim is barred under the four year statute of limitations of the Clayton Act, 15 U.S.C. § 15b, and the three year limitations period under the Donnelly Act, N.Y. Gen. Bus. Law § 342-a. Plaintiff claims that the limitations period was tolled until the federal indictment became public because of the fraudulent concealment by defendants of their bid rigging scheme.[8] Defendants argue that plaintiff was aware or should have been aware through due diligence prior to the federal indictment of the defendants' activities. Thus, they argue the statute of limitations should not be tolled and should operate as a bar to the instant action.

It is well settled that the statute of limitations in an antitrust action begins to run when the defendant commits an act that injures the plaintiff. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 806 (1971). In the context of a continuing antitrust conspiracy,

> this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those

> damages, the statute of limitations runs from the commission of the act.

Id.

The rule on tolling the statute of limitations is less clear. There appears to be some dispute among authorities regarding the elements the plaintiff must establish in order to successfully assert the doctrine of equitable tolling or fraudulent concealment to toll the statute of limitations under the Clayton Act, 15 U.S.C. § 15b.

In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit, in the context of a civil antitrust action, set forth the standard applicable to a claim of fraudulent concealment as follows:

> Once it appears that the staute of limitations has run, the *plaintiff* must sustain the burden of showing not merely that he failed to discover his cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence.

Id. at 461 (emphasis in original). *Accord Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir. 1985); *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir. 1982); *but see Robertson v. Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979).[9]

Recent decisions in other jurisdictions in cases involving alleged bid rigging schemes in violation of the Sherman Act are in accord with this formulation of the fraudulent concealment rule. *See State of Colorado v. Western Paving Construction Co.*, 630 F. Supp. 206, 208-10 (D. Colo. 1986); *Commonwealth of Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885, 887-90 (M.D. Pa. 1985). These courts have held that signing a false noncollusion affidavit or submitting a complementary bid was, at most, a failure to disclose or a denial of wrongdoing,

and did not amount to an affirmative act of concealment sufficient to toll the running of the limitations period. *State of Colorado v. Western Paving Construction Co., supra,* 630 F. Supp. at 209-10; *Commonwealth of Pennsylvania v. Lake Asphalt & Petroleum Corp., supra,* 610 F. Supp. at 888-89.

Plaintiff argues that it need not demonstrate affirmative acts of concealment by defendants in this action because a conspiracy to violate the antitrust laws is inherently self-concealing.[10] Some courts have adopted this view. *See, e.g., Greenhaw v. Lubbock County Beverage Association,* 721 F.2d 1019, 1030 (5th Cir. 1983), *overruled on other grounds, International Woodworkers v. Champion International Corp.,* 790 F.2d 1174, 1181 n.8 (5th Cir. 1986); *Baker v. F & F Investment,* 420 F.2d 1191, 1199 (7th Cir.), *cert. denied,* 400 U.S. 821, 91 S. Ct. 41 (1970); *United National Records, Inc. v. MCA, Inc.,* 609 F. Supp. 33, 37 (N.D. Ill. 1984). The Second Circuit has not, however, reached this conclusion. We have found no decisions in the Second Circuit directly holding that an antitrust conspiracy is inherently self-concealing.[11]

Thus, in order for plaintiff here to successfully assert the doctrine of fraudulent concealment and toll the limitations period under the Clayton and Donnelly Acts the plaintiff New York State must demonstrate that it did not discover its cause of action prior to the running of the limitations period, that it exercised due diligence, and that affirmative acts of fraudulent concealment by the defendant independent of the underlying conspiracy prevented it from discovering its cause of action notwithstanding its diligence. We find these issues are questions of fact and cannot be resolved by summary disposition. Dismissal of the action based on statute of limitations grounds is therefore denied.

Plaintiff's motion for summary judgment and defendants' motion for election of remedies and summary judgment are in all respects denied, and it is

SO ORDERED.

_____

U.S.D.J.

FOOTNOTES

[1] The pertinent portion of 15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

New York seeks treble damages and attorney's fees under Section 4 of the Clayton Act, 15 U.S.C. § 15(a).

[2] Section 340 of the New York General Business Law states in pertinent part:

> 1. Every contract, agreement, arrangement or combination whereby
>
> . . . .
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained . . . is hereby declared to be against public policy, illegal and void.

The statutory penalty for a violation of § 340 by an individual is a fine of not more than $100,000 and/or imprisonment for not longer than four years. A corporation convicted of violating § 340 may be fined not more than $1,000,000. N.Y. Gen. Bus. Law § 341 (McKinney Supp. 1986).

[3] Plaintiff argues that defendant Pratt, as president of Pratt, Inc., was "in privity with" Pratt, Inc., and thus is estopped from relitigating the issue of his liability for antitrust violations in this action.

[4] *Northern Pacific Railway v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 518 (1958).

[5] The Clayton Act provides a four year statute of limitations within which to file a claim for treble damages, 15 U.S.C. § 15b. The Donnelly Act provides a three year limitations period within which to file a claim for civil penalties. N.Y. Gen. Bus. Law § 342-a (McKinney 1968).

[6] Fed.R.Civ.P. 56(c) provides in pertinent part that "judgment . . . *shall* be rendered forthwith if . . . there is no genuine issue as to any material fact . . . ." (emphasis added). In light of this decision we need not reach the question of whether plaintiff has in fact satisfied the technical requirements of Rule 56.

[7] For the purpose of this summary judgment motion, defendants adopt plaintiff's contention that their convictions for mail fraud and RICO violations should be considered tantamount to convictions for antitrust violations because the activities underlying the mail fraud and RICO convictions were in fact antitrust violations.

[8] "[R]ead into every federal statute of limitations . . . is the equitable doctrine that in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir. 1982) quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977). Likewise, under New York law, a court may use its equity jurisdiction to extend the statute of limitations where the defendant fraudulently conceals the cause of action from the plaintiff. *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 272 N.Y.S.2d 337, 219 N.E.2d 169 (1966).

[9] In *Robertson v. Seidman & Seidman*, a decision subsequent to *City of Detroit v. Grinnell Corp., supra*, the Second Circuit appeared to adopt the position held by some courts that where there has been active concealment by the defendant, the plaintiff's due diligence is irrelevant in applying the doctrine of equitable tolling; i.e., in cases of active concealment the running of the limitations period is tolled until plaintiff discovers his cause of action. *See Hobson v. Wilson*, 737 F.2d 1, 34 n.103

(D.C. Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 1843 (1985); *Campell v. Upjohn Co.*, 676 F.2d 1122, 1127 (6th Cir. 1982); *Clute v. Davenport Co.*, 584 F. Supp. 1562, 1578 (D. Conn. 1984) (all citing *Robertson* for this proposition). Subsequent Second Circuit decisions applying the doctrine of equitable tolling have not followed *Robertson*. *See Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir. 1985); *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir. 1982).

[10] Plaintiff argues alternatively that even if the court finds that an antitrust conspiracy is not self-concealing and that submission of false noncollusion affidavits and complementary bids do not constitute affirmative acts of concealment that defendants did take affirmative steps independent of the underlying conspiracy to conceal the bid rigging scheme.

[11] In *City of Detroit v. Grinnell Corp.*, *supra*, 495 F.2d at 460-61, the Second Circuit, in the context of a civil antitrust action, took the position that affirmative acts of concealment by the defendant were necessary to toll the running of the limitations period, and thus, implied that antitrust conspiracies were not self-concealing. *See State of Colorado v. Western Paving Construction Co.*, 630 F. Supp. 206, 208 (D. Colo. 1986) (citing *City of Detroit* to support the conclusion that plaintiff must establish affirmative acts of concealment by a defendant in an antitrust action to toll the statute of limitations). However, this issue was not squarely presented to the court in *City of Detroit* because plaintiffs there did not argue they were within the tolling rule. *See Long v. Abbott Mortgage Corp.*, 459 F. Supp. 108, 118 (D. Conn. 1978).

The most recent district court decisions in the Second Circuit are consistent with the formulation of the fraudulent concealment rule set forth in *City of Detroit v. Grinnell Corp.*, *supra*. *See Korwek v. Hunt*, No. 84 Civ 7934 (S.D.N.Y. Oct. 24, 1986) (available Nov. 13, 1986, on LEXIS, Genfed library, Dist file); *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423, 1443 (S.D.N.Y. 1986). These cases do not explicitly address the issue of whether an antitrust conspiracy is self-concealing

(A 49-50)

The foreperson: No.

The Court: 3. Did any of the co-conspirators take any affirmative action, during the term of the conspiracy, to conceal the existence of the conspiracy; yes or no?

The foreperson: Yes.

The Court: 4. Was the County of Suffolk aware of the existence of the conspiracy alleged in the complaint:

A. prior to June 16, 1980; yes or no?

The foreperson: No.

The Court: Prior to June 16, 1979; yes or no?

The foreperson: No.

The Court: 5. Could the County of Suffolk in the exercise of due diligence have discovered the existence of the conspiracy alleged in the complaint:

(A) prior to June 16, 1980; yes or no?

The foreperson: No.

The Court: Prior to June 16, 1979; yes or no?

The foreperson: No.

The Court: Did any of the co-conspirators take any affirmative action, during the term of the conspiracy, to conceal the existence of the conspiracy; yes or no?

The foreperson: Yes.

The Court: Did you date and sign it?

The foreperson: Yes.

The Court: May I have your signed form. (Handed to Court.)

Juror number two, you heard the verdict as rendered by the foreman; is that your verdict?

Juror number two: Yes.

The Court: Juror number three; is that your verdict?

Juror number three: Yes.

The Court: Juror number four; is that your verdict?

Juror number four: Yes.

The Court: Juror number five; is that your verdict?

Juror number five: Yes.

The Court: Juror number six; is that your verdict?

Juror number six: Yes.

The Court: And so say you all?

Any motions before excusing the jury? All motions may be reserved.

(A 943-945)

Melore — Direct

Exhibit 17?

A 17, I received from Joseph Lomonte.

Q Now, Mr. Melore, do you know when the federal indictment concerning your investigation was filed?

A In April of 1983.

Q Agent Melore, prior to the filing of the federal indictment and, during your investigation, did you at any time ever disclose the subject of your investigation to any New York State employee?

A No.

Q During the course of your investigation, prior to the filing of the indictment in 1983, did you ever discuss the target of your investigation with any New York State employee?

A No.

Q Thank you.

Mr. Opper: I have no further questions.

Mr. Corcoran: No questions.

The Court: Mr. Blakeman will examine first?

Mr. Blakeman: Yes.

Cross Examination by Mr. Blakeman:

Q Agent Melore, my name is Robert M. Blakeman. I am the attorney for Hendrickson Brothers, Inc.

Agent Melore, there came a time when the FBI issued, or caused to be issued, a subpoena for the

The Witness: Not really, your Honor.

The Court: All right, the witness can't answer that yes or no.

Q Agent Melore, did yourself and other agents of the FBI spend any time at Hendrickson Brothers' premises in Valley Stream?

A Yes.

Q Did Hendrickson Brothers make available to you a conference room?

Mr. Sampson: Objection, your Honor.

The Court: Objection sustained.

Q When you were on the premises of Hendrickson Brothers, how many agents were there?

A Two.

Q How long were you there, give me a period of time?

A This is a guess, because I wasn't one of the two agents.

Q Your best approximation?

A Two or three months.

Q Was that working full time at the Hendrickson Brothers' premises?

A I think they were there most of the days of the week. It may not have been full time, exactly.

Mr. Sampson: The witness is not testifying from personal knowledge.

The Court: I will allow it to stand.

Q Is there anything else?

Mr. Blakeman: Yes.

Q From time to time, did your agents request explanations from Hendrickson Brothers?

Mr. Sampson: Objection.

The Court: Objection sustained.

Q Did you request, from Hendrickson Brothers, personally, different kinds of records from time to time?

A Yes.

Q Did they produce those records for you, whatever you asked?

A So far as I know. I wasn't the one, personally, asking for records.

Q Were you there from time to time, yourself, supervising?

A I was there on a couple of occasions. This was back in 1978, Mr. Blakeman. It's a --

Q Did you at any time make any request of Hendrickson Brothers personally to produce any particular kind of records while your agents were there?

A The best I could answer for that is, I may have.

(A 1269)

Jury Charge

The plaintiff must establish by a fair preponderance of the evidence in effect that they did not commence the action in time through no fault of its own, that they exercised due diligence under all the circumstances, and, further, that the defendants affirmatively acted to conceal the existence of the conspiracy and hide from the plaintiffs in effect the knowledge that they had a claim against the defendants.

The affirmative acts are acts separate and apart from the basic acts that establish collusive bidding; the exchange of information, the designation of a low bidder who would become the successful bidder. The acts I am talking about, however, must be acts committed during the term of the conspiracy. It does not matter whether only one defendant committed the acts, all the defendants are bound by the acts of a conspirator designed to conceal the existence of the conspiracy.

The first question is "Was the State of New York aware of the existence of the conspiracy alleged in the complaint? "I'll hold the dates for a moment. Well, the State of New York is not only a faceless entity, but a very large political. . . .

to distinguish those acts from the other claimed acts that the State of New York and the County of Suffolk introduced to show that the bidding was collusive. Those acts are basic to the collusive scheme, that is separate and apart from any affirmative acts that the state claims were used by the defendants to conceal the existence of the conspiracy.

So as to each plaintiff, the first relates to the State of New York. As to 1, 2, 4 and 5, the State of New York must prove the negative. Was the State of New York aware of the conspiracy alleged in the complaint? First, prior to June 16, 1980, if the scales are evenly balanced, then the answer is "yes." If the State of New York preponderated, then "no," and so on. Could the State of New York in the exercise of due diligence have discovered the conspiracy alleged in the complaint, the State of new York must establish the negative, "no."

As to 3, "Did any of the co-conspirators take any affirmative action, during the term of the conspiracy, to conceal the existence of the conspiracy?" The State of New York must prove the affirmative, "yes."

(A 1283)

The Court: "Conspiracy." If you notice I said during the course of the conspiracy, no other acts.

Ms. Mann: But I would submit, your Honor, there was no suggestion that one of the objects of the conspiracy was to conceal these acts after the bids were opened. There's no suggestion at all.

The Court: Well, you may be right. I will leave it as it is. I have no authority for it. Only common sense tells me that is the answer. Otherwise, what we'd have is Amfar would have one statute of limitations, the other defendants another. I can't believe that is the law.

Ms. Mann: Well, I would request, your Honor, that the special verdict form include a question asking the jury to specify what the acts were and who participated in them.

The Court: If they find affirmative acts, I can tell you there's no evidence that anybody else but Amfar participated in the affirmative acts. Is that right, Mr. Sampson? Any other defendant destroy records, pay-off, obstruct justice?

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 15b. Limitation of actions

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Oct 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283.

Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-21, 88-43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENDRICKSON BROTHERS, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

LIZZA INDUSTRIES, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a bid-rigging conspiracy on public contracts, do the submission of fraudulent non-collusion affidavits by which each bidder affirms that the bid prices were determined without collusion, that the prices have not been disclosed to a competitor, and that no attempt has been made to induce a competitor to submit or not to submit a bid, constitute affirmative acts of concealment under the doctrine of fraudulent concealment?

2. In an antitrust bid-rigging conspiracy, are affirmative acts of concealment perpetrated by one conspirator in furtherance of the conspiracy attributable to all co-conspirators for purposes of the doctrine of fraudulent concealment?

3. Can an antitrust plaintiff satisfy the wrongful concealment requirement of the fraudulent concealment doctrine by proving, *inter alia*, that participants in a bid-rigging conspiracy, in order to conceal the existence of the conspiracy, submitted prearranged losing bids, submitted fraudulent non-collusion affidavits, and agreed to limit excess profits?

PARTIES TO THE PROCEEDING

Petitioner in case No. 88-21 is Hendrickson Brothers, Inc. Petitioner in case No. 88-43 is Lizza Industries, Inc. Both petitions seek review of the same judgment.[1] Respondent is the State of New York.

[1] Amfar Asphalt Corp., Francis Ambrosio, Anthony Farino and Jack Farino were co-appellants in the appeal before the United States Court of Appeals for the Second Circuit and have not filed petitions to this Court for a writ of certiorari. Pratt and Pratt Inc., James J. Pratt and Herbert Hochreiter were defendants in the proceedings in the United States District Court for the Eastern District of New York, but were not parties to the appeal in the court of appeals.

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No. 88-21, 88-43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENDRICKSON BROTHERS, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

LIZZA INDUSTRIES, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of New York respectfully requests that this Court deny the petitions for writs of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

On February 16, 1988, the United States Court of Appeals for the Second Circuit affirmed a judgment entered by the United States District Court for the Eastern District of New York following a jury trial before the Hon. Jacob Mishler. The judgment awarded the State of New York ("State") $7,455,000 in

treble damages against petitioners Hendrickson Brothers, Inc. ("Hendrickson") and Lizza Industries, Inc. ("Lizza"), and its president Herbert Hochreiter, Amfar Asphalt Corp. ("Amfar") and its officers Francis Ambrosio, Anthony Farino, and Jack Farino ("the Amfar defendants"), and Pratt & Pratt, Inc. ("Pratt"), and its president James J. Pratt ("Guy Pratt") for conspiring to rig highway construction contracts in violation of the Sherman Act, 15 U.S.C. § 1. The court of appeals also affirmed judgments against Lizza, Hochreiter, and the Amfar defendants in the amount of $375,000 for conspiring to fix prices on construction materials contracts awarded by Suffolk County ("County") in 1978 and 1979. Finally, it affirmed the assessment of a civil penalty in the amount of $100 against each defendant for violating New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347 (McKinney 1968).[2] The opinion is reported at 840 F.2d 1065 (2d Cir. 1988); App. 1-38.[3]

Reviewing the proceedings below, the court of appeals concluded that the State had successfully proven the defendants' participation in the two bid-rigging conspiracies and had established the following. During the period covered by the complaint, five contracts let by the New York State Department of Transportation ("DOT") were collusively rigged by the defendants: the Veterans Memorial Highway contract ("Vets Highway") awarded to Lizza in February 1977; the Port Jefferson contract awarded to Amfar in June 1977; the Shelter Island contract awarded to Lizza in October 1977; the Long Island Expressway contract ("Expressway") awarded to Hendrickson in April 1978; and the Wantagh Avenue contract awarded to Pratt in October 1978. 840 F.2d at 1069; App. 5. Petitioners Hendrickson and Lizza were among the ringleaders of the conspiracy, referred to by the bid-riggers as the "Club of Five." 840 F.2d at 1070; App. 6-7. The "Club of Five" determined each prearranged

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[2] The State and County subsequently settled with defendants Pratt, Guy Pratt, and Hochreiter.

[3] Citations to "App. ____ " are references to the appendix to Hendrickson's petition.

contract winner, authorized the fixed contract price, imposed a 20-25% excess profit ceiling so as not to draw unwanted scrutiny, directed the other co-conspirators' role in the conspiracy, extracted kickbacks from the smaller contractors and recruited new members to the conspiracy who otherwise posed a legitimate competitive threat. 840 F.2d at 1070-72; App. 6-10.

Concealment of the conspiracy was essential to "ensure that the State would feel it had enough bids on any given contract to warrant awarding the contract immediately rather than calling for new bids." 840 F.2d at 1074; App. 13. The "Club of Five," therefore, designated certain contractors to submit prearranged losing, or accommodation bids, in order to give the appearance of competition. "Virtually all of the losing bids on these five contracts were submitted by Hendrickson, Amfar, Lizza or two other companies identified ... as members of ... [the] conspiracy." 840 F.2d at 1069; App. 5.

As a safeguard against collusion, DOT and the County required each bidder submitting a contract proposal to execute a non-collusive bidding certification in which the contractor affirmed under penalties of perjury that, *inter alia*:

> (1) The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;
>
> (2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and
>
> (3) No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.

Furthermore, when a contract was awarded, the winning bidder had to reaffirm the absence of collusion. 840 F.2d at 1069; App. 5. Each of the bidding proposals submitted by the conspirators and each of the contracts signed by them contained non-collusion certifications that were fraudulent.

The State commenced this antitrust action on June 16, 1983, two months after several of the defendants had been indicted by a federal grand jury on charges of mail fraud in connection with the bid-rigging scheme.[4] Although the last contract had been awarded more than four years before commencement of the action, the State alleged that the four year statute of limitations (15 U.S.C. § 15b) had been tolled because the conspiracy had been fraudulently concealed. Before trial, the State argued that the defendants' submission of accommodation bids and false non-collusion certifications had fraudulently concealed the bid-rigging conspiracy. App. 50-52. The district court declined to adopt the State's argument, and ruled that the State would be required to prove acts of concealment beyond the accommodation bids and non-collusion affidavits. At trial, therefore, in addition to the non-collusion affidavits and accommodation bids, the State submitted substantial evidence of other affirmative acts of concealment committed by the Amfar defendants in furtherance of the bid-rigging conspiracy. As summarized by the court of appeals, these acts included the following:

> After Amfar entered into the bid-rigging scheme, Ambrosio instructed LoMonte[5] to remove from the office the books and documents that reflected Amfar's participation in the scheme and the extra profits thereby earned. In July 1978, after LoMonte had been arrested on an unrelated matter, which resulted in the seizure

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[4] Lizza and Hochreiter were convicted in the United States District Court for the Eastern District of New York and their convictions were affirmed in *United States v. Lizza Industries, Inc.*, 775 F.2d 492 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Guy Pratt and Pratt pleaded guilty to ten counts of mail fraud. Petitioner Hendrickson was not a defendant in the criminal action.

[5] Co-conspirator Joseph LoMonte was Amfar's vice-president and controller and the State's principal witness at trial.

> of a ledger documenting Amfar's unreported cash transactions, including kickbacks to several of the coconspirators, he met with Ambrosio, Farino, and Anthony Farino to assess the situation. They discussed the documents that reflected the bid rigging and agreed that "it wouldn't be wise for any of us to talk." The Farinos suggested that the best way to get rid of the telltale documents would be to burn them. Many of the documents were thereafter burned; Amfar purchased a shredder to destroy the rest. The four men also agreed that LoMonte would give false testimony if called before a grand jury, and he did so.

840 F.2d at 1084; App. 33.

In affirming, the court of appeals rejected the defendants' statute of limitation claim and stated that a plaintiff may prove wrongful concealment "by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing." 840 F.2d at 1083; App. 32.[6] The court held that:

> the State sufficiently proved the concealment by the defendants of the conspiracies alleged in the complaint, both because the bid-rigging was self-concealing and because the Amfar defendants' affirmative acts of concealment were properly admissible against all of the defendants.

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[6] In considering the defendants' claim, the court recited the three-part test that an antitrust plaintiff must satisfy in order to invoke the doctrine of fraudulent concealment:

> (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part.

840 F.2d at 1083; App. 31. Petitioners agree that this is a proper statement of the test and that only the first of the three requirements is at issue here. (Hendrickson Br. at 5, Lizza Br. at 12).

840 F.2d at 1085; App. 34. The court found that the bid-rigging scheme fit squarely within the framework of a self-concealing conspiracy that must remain concealed in order to be successful because of a number of factors, including the agreement to limit excess profits, the submission of accommodation bids, and the submission of false non-collusion affidavits. 840 F.2d at 1084; App. 33. It concluded that the Amfar defendants' affirmative acts of concealment were attributable to all of the co-conspirators, including petitioners, because they were committed in the course of and in furtherance of the conspiracies. 840 F.2d at 1085; App. 34.

The court denied a petition for rehearing, containing a suggestion that the action be reheard *en banc*, on April 7, 1988. App. 39.

REASONS WHY THIS COURT SHOULD DENY THE PETITIONS

This Court need not address the questions petitioners present because, contrary to their assertions, Hendrickson and Lizza each committed affirmative acts of concealment by submitting fraudulent non-collusion affidavits with each rigged bid proposal and by falsely reaffirming the absence of collusion each time they entered into a contract. Affirmative acts of concealment toll the statute of limitations under the fraudulent concealment doctrine in every circuit that has ruled on the matter.

In any event, by attributing the affirmative acts of concealment committed by the Amfar defendants to their co-conspirators Hendrickson and Lizza, the court of appeals merely applied settled conspiracy law — that the acts of one conspirator in furtherance of the conspiracy are attributable to all co-conspirators. This holding is consistent with the decisions of this Court and petitioners do not cite any federal court of appeals' decision to the contrary.

Finally, the conclusion by the court of appeals that the bid-rigging conspiracy in this case was "self-concealing" is based on facts established at trial which would satisfy the fraudulent

concealment doctrine in all other federal appellate courts. This bid-rigging conspiracy included the submission of accommodation bids, the submission of non-collusion affidavits and an agreement to limit excess profits. These acts were in addition to those necessary to rig bids and were committed for the purpose of keeping the conspiracy concealed. These actions meet the fraudulent concealment test of every circuit whether a self-concealing theory or affirmative acts standard is applied. No applicable decisions of this Court are in conflict.

I.

BECAUSE HENDRICKSON AND LIZZA EACH COMMITTED AFFIRMATIVE ACTS OF CONCEALMENT SUFFICIENT TO TOLL THE STATUTE OF LIMITATIONS, THE QUESTIONS OF WHETHER THEIR CO-CONSPIRATORS' ACTS OF CONCEALMENT CAN BE ATTRIBUTED TO THEM, AND WHETHER THIS CONSPIRACY WAS SELF-CONCEALING, ARE NOT PROPERLY PRESENTED

This Court need not address the questions presented by Hendrickson and Lizza because, contrary to their assertions, each contractor committed affirmative acts of concealment sufficient to toll the statute of limitations. In its decision, the Court of Appeals for the Second Circuit recognized that the contractors' submission of non-collusion affidavits with each rigged bid constituted an affirmative act "performed . . . to conceal the conspiracy." 840 F.2d at 1084; App. 34. This determination is in accord with a very recent decision of the Court of Appeals for the Fifth Circuit in a bid-rigging case. *Texas v. Allan Construction Co.*, No. 87-1766, (5th Cir. Aug. 17, 1988) (available Aug. 17, 1988 on WESTLAW CTA5 library at 9). No decisions of this Court or any other federal court of appeals is in conflict.

In their non-collusion affidavits both Hendrickson and Lizza affirmed independently under penalties of perjury[7] that the

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[7] By executing a fraudulent non-collusion bidding certification in New York, a contractor can be prosecuted not only for perjury, but also for the independent crime of offering a false instrument for filing in the first degree. N.Y. Penal Law § 175.35 (McKinney 1975).

prices in their bids were not the product of collusion, that they had not disclosed the prices to a competitor, and that they had not made any attempt to induce a competitor to submit or not to submit a bid. Hendrickson committed six affirmative acts of concealment. It submitted false non-collusion affidavits with its accommodation bids on the Vets Highway, Port Jefferson, Shelter Island, and Wantagh Avenue contracts. 840 F.2d at 1069-71; App. 5-8. Hendrickson also submitted a fraudulent non-collusion affidavit with its predetermined winning bid on the Long Island Expressway contract and falsely reaffirmed the absence of collusion when it signed the contract. *Id.*

Lizza committed at least seven affirmative acts of concealment. Lizza submitted a false non-collusion affidavit with its accommodation bid on the Port Jefferson contract. It submitted false non-collusion affidavits with its winning bids on the Vets Highways and Shelter Island projects and falsely reaffirmed the absence of collusion when it signed each contract. Lizza also submitted false non-collusion affidavits on the two rigged County materials contracts. 840 F.2d at 1069-71; App. 5-8.

These multiple acts of concealment committed by petitioners Hendrickson and Lizza, which constitute separate criminals acts, would meet the affirmative acts test in any circuit. The questions petitioners raise, therefore, whether their co-conspirators' acts of concealment can be attributed to them, and whether this conspiracy was self-concealing, are not properly presented.

II.

THE HOLDING OF THE COURT BELOW THAT THE AFFIRMATIVE ACTS OF CONCEALMENT PERPETRATED BY THE AMFAR DEFENDANTS IN FURTHERANCE OF THE BID-RIGGING CONSPIRACY WERE ATTRIBUTABLE TO CO-CONSPIRATORS HENDRICKSON AND LIZZA IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

The court of appeals' decision attributing the Amfar defendants' affirmative acts of concealment to co-conspirators Hendrickson and Lizza neither conflicts with the decisions of this Court or other federal courts of appeals nor presents an important question of federal law which should be determined by this Court. The court of appeals merely applied settled conspiracy law that acts of a conspirator in furtherance of the conspiracy are attributable to all co-conspirators regardless of whether they authorized or had knowledge of the acts. *Lutwak v. United States*, 344 U.S. 604, 618 (1953); *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946); *Hyde v. United States*, 225 U.S. 347, 369 (1912); *United States v. Kissel*, 218 U.S. 601, 608 (1910).

In their efforts to frame an issue appropriate for review by this Court, petitioners misconstrue the record in two important respects and attempt to argue questions of fact. First, they contend that the acts of concealment occurred after the objectives of the conspiracy had been accomplished. (Hendrickson Br. at 17, Lizza Br. at 19-20). The court of appeals concluded, however, that there was ample evidence to support the jury's factual determination that

> both the NYSDOT contracts conspiracy and the County materials contracts conspiracy remained in existence at the time the Amfar defendants destroyed documentary evidence and initiated the fabrication of false testimony.

840 F.2d at 1084-85; App. 34.

Second, they assert that the acts of concealment were beyond the "reasonable intendment" of the objectives of the conspiracy. (Hendrickson Br. at 16, Lizza Br. at 18). This is incorrect because the court of appeals held that there was sufficient evidence to support the finding that active concealment of the conspiracy was essential to its success since the conspiracy continued over an extended period of time and involved a number of contracts.

> Given the continuation of the two conspiracies and the fact that secrecy was essential to their continued existence, it was entirely appropriate for the court to allow use of the Amfar defendants' actions against the other coconspirators – even if the latter did not know of the actions – since they were acts in furtherance of the conspiracies.

840 F.2d at 1085; App. 34 (citations omitted).

The decision of the court of appeals is entirely consistent with the decisions of this Court. In *Grunewald v. United States*, 353 U.S. 391 (1957), this Court recognized that acts of concealment can have significance in furthering a conspiracy where "the successful accomplishment of the crime necessitates concealment," 353 U.S. at 405, and that a "vital distinction must be made between acts of concealment done in furtherance of the *main* objectives of the conspiracy and acts of concealment done after these central objectives have been obtained for the purpose only of covering up after the crime." *Id.* (emphasis in original). Here, the successful accomplishment of the bid-rigging conspiracy necessitated concealment and the acts were done in furtherance of its main objectives while the conspiracy remained in existence.

The decision by the court of appeals, attributing the acts of concealment of one antitrust conspirator to them all for purposes of the doctrine of fraudulent concealment, is also consistent with a recent decision of the only other court of appeals

to address the specific issue.[8] In *Pinney Dock & Transport Co. v. Penn. Central Corp.*, 838 F.2d 1445 (6th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3075 (U.S. July 11, 1988) (No. 88-72),[9] the court of appeals employed the test articulated by the district court that "one means of wrongful concealment of an ongoing antitrust conspiracy is a co-conspirator's fraudulent misrepresentations." 838 F.2d at 1474. If a defendant's fraudulent misrepresentations toll the statute of limitations for his co-conspirators, certainly the burning and shredding of documents and fabrication of false testimony, which occurred here, does so as well.

III.

THE HOLDING OF THE COURT BELOW THAT FRAUDULENT CONCEALMENT WAS ESTABLISHED BECAUSE THE BID-RIGGING CONSPIRACY IN THIS CASE WAS SELF-CONCEALING IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS INCLUDING THOSE WHICH REQUIRE AFFIRMATIVE ACTS OF CONCEALMENT

The decision by the court of appeals that fraudulent concealment was established because this particular bid-rigging

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[8] The affirmance by the Court of Appeals for the Tenth Circuit of the district court's decision by an evenly divided court sitting *en banc*, *Colorado ex rel. Woodard v. Western Paving Construction Co.*, 841 F.2d 1025 (10th Cir. 1988), *vacating* 833 F.2d 867 (1987), *petition for cert. filed*, 56 U.S.L.W. 3881 (U.S. June 8, 1988) (No. 87-2027) has no precedential value. *United States v. Gomez*, 810 F.2d 947, 957 (10th Cir.), *cert. denied*, 107 S.Ct. 2488 (1987); *Loeffler v. Tish*, 806 F.2d 817, 818 (8th Cir. 1986), *petition for cert. granted on other grounds*, 107 S. Ct. 3227 (1987); *United States v. Baldwin*, 691 F.2d 718, 722 (5th Cir. 1982); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1069 n. 49 (D.C. Cir. 1981). *See also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 759 n.5 (1984). This is consistent with the weight this Court gives its own equally divided decisions. *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

[9] The interlocutory petition in *Pinney Dock* raises procedural claims not relevant to any of the issues presented by petitioners here.

conspiracy was self-concealing, is unexceptional and consistent with the rulings in other circuits. In evaluating an antitrust plaintiff's claim of fraudulent concealment, courts of appeals have formulated two methods of analysis. In the Second Circuit, as reflected by this decision, as well as in the Seventh and the Tenth Circuits, a plaintiff may satisfy the wrongful concealment requirement by demonstrating that the particular antitrust conspiracy alleged was self-concealing.[10] In the First, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits, a plaintiff must show some affirmative conduct directed at concealing the cause of action in order to toll the statute of limitations.[11] In a case such as this, however, regardless of the label attached, the results of the analysis are the same. Here, in particular, the proof established compelled the Court of Appeals for the Second Circuit to find fraudulent concealment under both the "self concealing" theory and "affirmative acts" test.

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[10] *See, e.g., Baker v. F & F Investment*, 420 F.2d 1191, 1199 (7th Cir.) *cert. denied*, 400 U.S. 821 (1970); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982). The Court of Appeals for the District of Columbia has employed the self-concealing theory in a civil rights case, *Hobson v. Wilson*, 737 F.2d 1, 33-34 & n.102 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), while the Eleventh Circuit and the Temporary Emergency Court of Appeals have recognized that certain wrongs are self-concealing. *Hill v. Texaco Inc.*, 825 F.2d 333, 335 n.2 (11th Cir. 1987); *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978). As noted in n.8 above, affirmance by the Court of Appeals for the Tenth Circuit of the district court's decision by an evenly divided court sitting *en banc* in *Woodard* has no precedential value.

[11] *See, e.g., Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *Pocahontas Supreme Coal Co. v. Bethlehem Steel*, 828 F.2d 211, 219 (4th Cir. 1987); *Texas v. Allan Construction Co.*, No. 87-1766 (5th Cir. Aug. 17, 1988) (available Aug. 17, 1988 on WESTLAW CTA5 library at 7); *Pinney Dock & Transport Co. v. Penn Central Corp.* 838 F.2d 1445, 1465-80 (6th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3075 (U.S. July 11, 1988) (No. 88-72); *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962); *Rutledge v. Boston Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). The Third Circuit apparently has not decided which analysis applies to questions of federal law.

The court below characterized this bid-rigging conspiracy as self concealing because of a number of factors all designed to insure the secrecy of the scheme, including the submission of non-collusion affidavits, accommodation bids, and an agreement to limit excess profits. 840 F.2d at 1084; App. 33. These actions, which went well beyond merely rigging the bids, are precisely the sort of deceptive conduct required by the affirmative acts test.[11]

Petitioners' contention that the questions presented require review relies heavily on their claim that there is an irreconciliable conflict between the decision of the court below and the recent decision in *Pinney Dock & Transport Co.* Had this case been tried in the Sixth Circuit, however, the issue of the petitioners' fraudulent concealment would have been just as conclusively decided against them. Discussing the type of conduct sufficient for purposes of affirmative concealment, the *Pinney Dock* court turned to a bid-rigging case, *Ingram Corp. v. J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,277 (E.D. La. 1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir. 1983), as an example:

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[11] Indeed, the Court of Appeals for the Eighth Circuit ruled in a price-fixing case that allegations of secret meetings, the use of public pay phones, concealment or destruction of documents, and use of a code to conceal bid-rigging activities, if proven, would constitute affirmative acts of concealment. The court held further:

> We are not persuaded to believe that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized.

Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 284 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962).

> The affirmative acts referred to [in *Ingram*] . . . included submitting prearranged losing bids by the company that had agreed not to receive the award, in order to give the illusion of competition among the corporate defendants, and maintaining agreed-upon ratios of major equipment spreads and positioning equipment in particular localities throughout the world so as to give the the false impression that excessive bids on particular projects were the result of equipment availability rather than of the unlawful conspiracy.

838 F.2d at 1473. The affirmative acts committed by the petitioners in this case are at least as misleading and constitute "precisely the sort of affirmative act of deception required by the jurisprudence." *Ingram Corp. v. J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,277 at 78,414.

The functional identity between the self-concealing theory applied by the court below and the affirmative acts test utilized in other circuits is clearly demonstrated by a recent decision of the Court of Appeals for the Fifth Circuit. In *Texas v. Allan Construction Co.*, No. 87-1766 (5th Cir. Aug. 17, 1988) (available Aug. 17, 1988 on WESTLAW CTA5 library), the Fifth Circuit, while ruling that a bid-rigging conspiracy is not inherently self-concealing, held nonetheless that a plaintiff may satisfy the affirmative acts test by proof that the conspirators submitted non-collusion affidavits, conducted covert meetings and submitted accommodation bids. *WESTLAW* op. at 7-9. Thus the very same proof, established by the State in this case, satisfies both concealment standards.

Finally the decision of the court below that the bid-rigging conspiracy in this case was self-concealing is entirely consistent with the applicable decisions of this Court. This Court has long recognized that:

> To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead

> the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874). Here the court of appeals merely applied this Court's holding in *Bailey* that where a fraud which is the foundation of the suit, "is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." 88 U.S. (21 Wall.) at 349-350.[13] Petitioners have failed to offer a reason for witholding application of *Bailey* to a conspiracy such as the one proven below which was based on repeated and intentional, material misrepresentations designed to conceal the conspiracies' existence, and which has resulted in damage to the public as represented by respondent.

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[13] Although the court of appeals in *Pinney Dock* ruled that the antitrust conspiracy alleged could not be self-concealing because it was not based on fraud, 838 F.2d at 1472, it does not follow that a bid-rigging conspiracy which is in the nature of fraud could never be self-concealing. Indeed, several courts of appeals have held that bid-rigging conspiracies on publicly-funded projects constitute schemes to defraud under 18 U.S.C. § 1341 as well as violations of the Sherman Act, particularly where fraudulent non-collusion affidavits have been submitted. *See, e.g., United States v. Washita Construction Co.*, 789 F.2d 809, 817 (10th Cir. 1986); *United States v. Rodgers*, 624 F.2d 1303 (5th Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *United States v. Azzarelli Construction Co.*, 612 F.2d 292, 298 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980). Moreover the United States Department of Justice Antitrust Guidelines for International Operations (Draft Revision June 8, 1988), 53 Fed. Reg. 21584, 21588 n.51 (1988), state that in addition to prosecution under the Sherman Act, naked horizontal agreements such as bid-rigging schemes may also be prosecuted under federal statutes outlawing fraud, such as mail and wire fraud, 18 U.S.C. §§ 1341, 1343, conspiracy to defraud the government, 18 U.S.C. § 371 and making false statements to a government agency 18 U.S.C. § 1001.

CONCLUSION

For all the foregoing reasons, this Court should deny both petitions for writs of certiorari.

Dated: August 24, 1988
New York, New York

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENDRICKSON BROTHERS, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Hendrickson Brothers, Inc. ("Hendrickson") respectfully submits this brief, pursuant to Rule 22.5 of the Rules of the Court, in further support of its Petition (the "Petition") that a writ of certiorari issue to review the decision of the United States Circuit Court for the Second Circuit entered in this case on February 16, 1988.

This Brief will discuss two developments since the filing of Hendrickson's Petition – the Fifth Circuit's decision in *Texas* v. *Allen Construction Co.*, 851 F.2d 1526 (5th Cir. 1988) and the filing of the Brief of 42 States as Amici Curie in Support

of Petitioners in *State of Colorado ex. rel. Woodward* v. *Western Paving Construction Co.*, 841 F.2d 1025 (10th Cir. 1988) *vacating* 833 F.2d 867 (1987), *petition for cert. filed* 56 U.S.L.W. 3881 (U.S. June 8, 1988) (No. 87-2027). These two events further compel the grant of Hendrickson's Petition. This Brief also will respond to certain contentions in the Brief in Opposition to the Petition submitted by respondent State of New York (the "State"). Respondent's Brief embraces the Second Circuit's radical evisceration of a statute of limitations defense in antitrust conspiracy actions promulgated in this case.

I.

THE FIFTH CIRCUIT SPECIFICALLY REJECTED THE SECOND CIRCUIT'S HOLDING THAT BIDRIGGING CONSPIRACIES ARE INHERENTLY SELF-CONCEALING.

Hendrickson's Petition established that there is an irreconcilable "conflict among the circuits" whether an antitrust conspiracy may be found to be inherently self-concealing. The Court is respectfully referred to pages 6 through 13 of the Petition. The Fifth Circuit's decision in *Texas* v. *Allen Construction Co.*, *supra*, deepens this conflict by specifically rejecting the Second Circuit's holding that "proof of the conspiracy itself sufficed to prove concealment by the co-conspirators." *State of New York* v. *Hendrickson Brothers, Inc.*, 840 F.2d at 1065, 1084 (2nd Cir. 1988). The Fifth Circuit ruled:

> [W]*e do not agree with the Second Circuit that antitrust violations arising from a bid-rigging conspiracy are always self-concealing.* It is true of any price-fixing conspiracy that "it must remain concealed to be successful." Because price-fixing is illegal, public knowledge of the activity usually ends the agreement. This deceptive aspect of the conspiracy is, in the words of *Hobson*, intended solely to "cover up" the illegal act. Nor is bid-rigging unique because it must "exist for an extended period of time." Every cartel seeks to reap monopoly profits for as long as possible, and because a cartel must limit output, its members have to

> distribute fewer sales among themselves. We cannot see how this aspect of a bid-rigging conspiracy makes it more deceptive than any other price-fixing conspiracy.
>
> *We also are unpersuaded by the Second Circuit's additional argument that bid-rigging is self-concealing because a rigged bid purports to be competitive when in fact it is collusive.* Any price charged for a product or service, whether in the form of a bid or otherwise, purports to be comptetive at least insofar as it purports to be lawful. In short, we cannot conclude that Congress, in writing the Clayton Act's four-year statute of limitations, could have intended for the fraudulent concealment doctrine to apply to every price-fixing case. Hence, we reject the State's contention that because the bid-rigging conspiracy was inherently self-concealing, it need not prove affirmative acts of concealment.

(851 F.2d at 1530-31; emphasis added and footnotes omitted). The Fifth Circuit reversed the grant of summary judgment for defendants and remanded the case to the district court for a determination whether defendants' conduct constituted the requisite affirmative acts of concealment. (851 F.2d at 1534).

The State speculates that had the facts of the instant case been applied to the Fifth Circuit's ruling in *Texas* v. *Allen Construction*, Hendrickson would not be entitled to a statute of limitation defense because Hendrickson's submission of non-collusion affidavits and accommodation bids constitute affirmative acts of concealment under *Texas* v. *Allen Construction*. (State's Brief in Opposition, p. 14). The State misses the point.

In the present case, the jury was not required to find — and did not find — that Hendrickson committed a single affirmative act of concealment. The jury only was required to find that *any* defendant committed an affirmative act of concealment. The court imputed that act against the other defendants. The Court is respectfully referred to the Petition at page 6. Moreover, the

Second Circuit did not hold that Hendrickson committed an affirmative act of concealment. The Circuit Court implicitly ruled that it was not necessary to reach that question since it held that a bidrigging conspiracy is inherently self-concealing.

The Fifth Circuit's decision in *Texas* v. *Allen Construction Co.* highlights that only the Second Circuit has held that an antitrust conspiracy may be found to be inherently self-concealing. We respectfully request that the Court grant Hendrickson's Petition and rule that the Second Circuit's holding – which conflicts with every other Circuit that has ruled on this issue – is without merit and should be reversed.

II.

THE FRAUDULENT CONCEALMENT DOCTRINE IS RIPE FOR CONSIDERATION BY THE COURT

The State contends that there is no apparent need for the Court to grant Hendrickson's Petition since the fraudulent concealment doctrine is well-settled. Thus, the State argues the Second Circuit's holding that the "bid-rigging conspiracy was self-concealing is unexceptional and consistent with the rulings in the other circuits." (State Brief at 11-12).

The State's position conflicts with the recently filed Brief of 42 States as Amici Curie in Support of Petitioners ("Amici Curie Brief") in *State of Colorado* v. *Western Paving Construction Co.*, Index No. 87-2027. (Colorado's Petition for a writ of certiorari is pending before the Court). The Amici Curie Brief vigorously urges the Court to consider the scope of the fraudulent concealment doctrine because the law in the area is "confusing and vague":

> *This Court has not considered the doctrine of fraudulent concealment as it applies to an antitrust bidrigging case. At the appellate and district court levels, case law on the doctrine of fraudulent concealment in antitrust cases is inconsistent, confusing, and vague.* Federal courts have applied three conflicting

> standards to satisfy the concealment element of the fraudulent concealment doctrine: (1) the self-concealing conspiracy standard [adopted in the present case]; (2) the affirmative acts standard; and, (3) the affirmative acts, separate and apart, standard. *Western Paving* adopted the affirmative acts, separate and apart, concealment standard.

Amici Curie Brief at 4; emphasis added.

Contrary to the State's argument, the Amici Curie Brief contends that the Second Circuit's decision is not "unexceptional and consistent" with the other Circuits. Indeed, the Amici Curie Brief states that the Tenth Circuit's decision in *State of Colorado* v. *Western Paving* "can [not] be reconciled with the Second Circuit's decision [in the present case] on the fraudulent concealment doctrine." (*Id.*)

Hendrickson concurs with the conclusion reached in the Amici Curie Brief that current case law applying the doctrine of fraudulent concealment doctrine is "inconsistent, confusing and vague." (*Id.*) Accordingly, Hendrickson urges the Court to grant its Petition and address the substantial issues regarding this "hopelessly confused" body of law. (Amici Curie Brief at 5).

III.

AMFAR'S AFFIRMATIVE ACTS OF CONCEALMENT SHOULD NOT BE ATTRIBUTED TO HENDRICKSON

The Second Circuit ruled that a criminal or tortious act of a defendant to conceal a conspiracy — not known or authorized by a co-defendant — should deprive the co-defendant of its statute of limitations defense, even where there is no finding that the wrongful act is part of the conspiracy alleged. The State alleges that this ruling does not "presen[t] an important issue of federal law which should be determined by this Court." (State's Brief at 9). The Second Circuit's ruling that a criminal act of a defendant, not known by a co-defendant and which

transpires years after the termination of the conspiracy, may waive the limitations defense of the co-defendant is the death knell for that defense in an antitrust conspiracy action. Notably, the State can not cite a single case supporting the Circuit Court's holding.[1]

The State argues that Amfar's acts of concealment, the destruction of documents and a plan to give false testimony to a grand jury, were part of the "reasonable intendment" of the bidrigging conspiracy because, as the Circuit Court found, "the active concealment of the conspiracy was essential to its success." (State's Brief at 10). The State overlooks the fact that the State did not allege — and there was no finding by the jury — that the bidrigging conspiracy included an agreement or understanding that Amfar would destroy information and give false testmony.

Indeed, the trial court's charge to the jury and the special verdict form did not require the affirmative acts to be in furtherance of any common understanding or agreement. The Court is respectfully referred to page 17 of the Petition.

The State's contention that Hendrickson should be denied its statute of limitations defense as a result of Amfar's acts of concealment is particularly pernicious since Hendrickson cooperated with the federal government's investigation of the conspiracy by producing all requested documents. The Court is respectfully referred to pages 58 through 60 of the Appendix to the Petition. Hendrickson's cooperation with the federal investigation of the same conduct at issue in this case should have special significance since the fraudulent concealment doctrine is at issue.

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[1] The State cites *Lutwak v. United States*, 344 U.S. 604 (1953) for the proposition that the acts of one conspirator in furtherance of a conspiracy is attributable to all co-conspirators "regardless of whether they authorized or had knowledge of the acts." (State's Brief at 9). *Lutwak* involved a criminal conspiracy through which aliens gained illegal entry into the United States as spouses of honorably discharged veterans. There is no holding or dicta in *Lutwak* stating that acts to conceal a conspiracy by a defendant, not authorized, agreed to or known by a co-defendant, are attributable to the co-defendant to deny the co-defendant its statute of limitations defense.

A final, troubling aspect of the State's Brief is that it insinuates that Hendrickson was guilty of violating various state and federal criminal statutes in connection with the bidrigging conspiracy. (Hendrickson's acts of concealment "constitute separate criminal acts. . ."; State's Brief at 8; see also State's Brief at 7, 15, ftntes. 7, 13). Hendrickson – unlike its co-defendants – was never indicted or made party to any federal or state criminal proceeding arising out of the conspiracy. However, Hendrickson was tried in this treble damages civil suit together with defendants which had been indicted and convicted of crimes relating to the highway construction contracts involved in this lawsuit. The State's suggestion that Hendrickson's statute of limitations defense should be defeated by innuendo of criminal misconduct is unworthy and must be rejected by the Court.

CONCLUSION

This year alone, the Second Circuit in *State of New York* v. *Hendrickson Brothers*, the Fifth Circuit in *Texas* v. *Allen Construction*, the Sixth Circuit in *Pinney Dock and Transport* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988) and the Tenth Circuit in *State of Colorado* v. *Western Paving Construction Co.* have grappled – and reached conflicting results – with the appropriate standard for applying the fraudulent concealment doctrine in antitrust conspiracy actions. The issues raised in these cases have an enormous impact on all conspiracy actions and are ripe for consideration by this Court. It is therefore respectfully requested that the Court grant the Petition of Hendrickson Brothers, Inc.

September 15, 1988 Respectfully submitted,

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